

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 133

THE KANSAS NATURAL GAS COMPANY, PLAINTIFF IN
ERROR,

v.

STATE OF KANSAS ON THE RELATION OF A. E. HELM,
ATTORNEY FOR THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED OCTOBER 6, 1923.

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(29,192)

THE COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 642.

NATURAL GAS COMPANY, PLAINTIFF IN
ERROR,

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KANSAS ON THE RELATION OF A. E. HELM,
FOR THE PUBLIC UTILITIES COMMISSION
STATE OF KANSAS.

THE SUPREME COURT OF THE STATE OF KANSAS.

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IN THE

Supreme Court of the State of Kansas.

No. 24307.

THE STATE OF KANSAS on the Relation of A. E. HELM, Attorney for
the Public Utilities Commission of the State of Kansas, Plaintiff,
vs.

THE KANSAS NATURAL GAS COMPANY, Defendant.

Caption.

Be it remembered, that on the 25th day of April 1922, there was
filed in the office of the Clerk of the Supreme Court of the State of
Kansas, a Petition for an Alternative Writ of Mandamus, also a
Motion for an Incidental Order, which Petition for an Alternative
Writ of Mandamus, and Motion for an Incidental Order, are in the
words and figures as follows, to-wit:

2

In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Petition and Motion for Alternative Writ of Mandamus.

[Filed Apr. 25, 1922.]

Now comes said plaintiff and for cause of action against defendant
alleges:

I.

That Clyde M. Reed, H. A. Russell and Jesse W. Greenleaf are
the duly appointed, qualified and acting members of the Public
Utilities Commission of the State of Kansas, and as such constitute
the Public Utilities Commission of the State of Kansas.

II.

That A. E. Helm is the duly appointed, qualified and acting at-
torney for the Public Utilities Commission of the State of Kansas.

III.

That on the 25th day of April, 1922, and prior to the filing
of this petition, the said Public Utilities Commission of the State
of Kansas entered an order directing that said A. E. Helm begin
and prosecute an action in the Supreme Court of the State of Kan-

sas against the above named defendant, for the purpose of procuring an order from said Court directing the said defendant to reinstate and maintain in the future the rate of 35 cents per thousand cubic feet of natural gas furnished by the defendant to the distributing companies at the city gates of the cities obtaining their supply of natural gas from pipe lines of the defendant in the State of Kansas, until the defendant has obtained the consent of the Public Utilities Commission for the State of Kansas to change said rate.

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IV.

That the said Kansas Natural Gas Company is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Kansas under the laws of the State of Kansas.

V.

That the Atchison Railway Light and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the City of Atchison, Kansas, and its inhabitants.

VI.

That the American Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Altamont, Galena, Oswego, Columbus, Cherokee and Scammon, Kansas, and the inhabitants thereof.

VII.

That the Baldwin Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the City of Baldwin, Kansas, and its inhabitants.

VIII.

That the Coffeyville Gas and Fuel Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Coffeyville and Liberty, Kansas, and the inhabitants thereof.

IX.

That the Anderson County Light and Heat Company is a corporation duly organized and authorized to do business in the

4 State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Colony and Welda, Kansas, and the inhabitants thereof.

X.

That the Tri City Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Cherryvale, Kansas, and its inhabitants.

XI.

That the Edgerton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Edgerton, Kansas, and its inhabitants.

XII.

That the Gardenr Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Gardner, Kansas, and its inhabitants.

XIII.

That the Kansas Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Independence, Kansas, and its inhabitants.

XIV.

That the Wyandotte County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Kansas City, Kansas, and Rosedale, Kansas, and the inhabitants thereof.

5

XV.

That the Citizens Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Lawrence, Kansas, and its inhabitants.

XVI.

That the Leavenworth Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged

Petition for Alternative Writ of Mandamus.

in the business of furnishing and distributing natural gas to the city of Leavenworth, Kansas, and its inhabitants.

XVII.

That the Johnson County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Lenexa, Merriam and Shawnee, Kansas, and the inhabitants thereof.

XVIII.

That the Ottawa Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Ottawa, Kansas and its inhabitants.

XIX.

That the Olathe Gas and Distributing Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the city of Olathe, Kansas, and its inhabitants.

XX.

6 That the Parsons Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Parsons and Dennis, Kansas, and the inhabitants thereof.

XXI.

That the Kansas Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Pittsburg, Kansas, and its inhabitants.

XXII.

That the Richmond and Princeton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Richmond, Princeton and Scipio, Kansas and the inhabitants thereof.

XXIII.

That the Kansas Farmers Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas in the city or town of South Park,, Kansas, and to its inhabitants and in the vicinity thereof.

XXIV.

That G. J. Swan, Receiver of the Consumers Light, Heat and Power Company of Topeka, Kansas, a corporation duly organized and authorized to do business in the State of Kansas, under the laws of the State of Kansas, is engaged in the business of furnishing and distributing natrual gas to the cities of Topeka and Oakland, Kansas, and the inhabitants thereof.

XXV.

That the Tonganoxie Oil and Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natrual gas to the cities of Tonganoxie and Reno, Kansas and the inhabitants thereof.

XXVI.

That the Baltic Operating Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natrual gas to the city of Thayer, Kansas, and its inhabitants.

XXVII.

That the Weir Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Weir City, Kansas, and its inhabitants.

XXVIII.

That the Wellsville Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natrual gas to the cities of Wellsville and Le Loup, Kansas, and the inhabitants thereof.

XXIX.

That the Tyro Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Tyro, Kansas, and its inhabitants.

XXX.

That the City of Chanute, Kansas, is a municipal corporation duly organized under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the said city of Chanute, Kansas, and its inhabitants.

XXXI.

8 That the said defendant, the Kansas Natural Gas Company is a public utility and is now and for more than one year last past has been engaged in the transportation and sale of natural gas to the above named distributing companies, furnishing and distributing natural gas to said cities and the inhabitants thereof in the State of Kansas.

XXXII.

That prior to about April 25, 1922, the said defendant maintained and charged a rate of 35 cents per 1,000 cubic feet of natural gas at the city gates; of said cities that said rate of 35 cents per 1,000 cubic feet of natural gas was authorized by an order of the District Court of the United States, for the District of Kansas, First Division, under date of January 20, 1920, and approved by an order of the Public Utilities Commission of the State of Kansas under date of August 18, 1920.

XXXIII.

That under date of April 1, 1922, the said defendant notified the above named distributing companies in writing that on and after the April, 1922, meter reading, said distributing companies would be charged at the rate of 40 cents per thousand cubic feet for all gas delivered to them at the town border measuring station.

That the following letter, addressed to the Consumers Light, Heat and Power Company is a copy of an identical notice which was sent by the defendant to each of said distributing companies:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

"Consumers Light, Heat & Power Co., Topeka, Kansas.

GENTLEMEN: You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch. Very truly yours, Kansas Natural Gas Co.,
By H. L. Montgomery."

9 That the April, 1922, meter reading date is April 25, 1922.

XXXIV.

That said defendant is at the time of the filing of this petition charging a rate of 40 cents per thousand cubic feet of natural gas furnished at the city gates of the cities of Kansas, served with natural gas by the distributing companies hereinbefore named.

XXXV.

That no application was made, presented to or filed with the Public Utilities Commission of the State of Kansas by the said defendant, the Kansas Natural Gas Company, for permission to change its rate of 35 cents per thousand cubic feet of gas at the city gates of said cities to said rate of 40 cents per thousand cubic feet of natural gas so furnished.

XXXVI.

That the Public Utilities Commission of the State of Kansas has not in any way or manner consented to, permitted or ordered the change in said rate of 35 cents per thousand cubic feet of gas, or to collect the rate of 40 cents per thousand cubic feet of natural gas so furnished to said cities.

XXXVII.

That the said defendant, the Kansas Natural Gas Company, has wrongfully and unlawfully changed the rate lawfully in effect for natural gas at the city gates of said cities without the consent of the Public Utilities Commission for the State of Kansas, and will continue to charge and collect from said distributing companies the increased rate of 40 cents per thousand cubic feet for natural gas at the city gates of said cities, unless said defendant shall be required by an order of this Honorable Court to re-establish and maintain the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities.

XXXVIII.

That said plaintiff and the distributing companies furnishing and distributing natural gas to the cities of Kansas and the inhabitants thereof, referred to herein, have no adequate remedy in the ordinary and usual course of the law to compel the defendant, the Kansas Natural Gas Company, to reestablish the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities, and to maintain the same until consent is obtained by said defendant from the Public Utilities Commission of the State of Kansas to change said rate of 35 cents per thousand cubic feet of natural gas.

Wherefore, plaintiff moves the Court and prays for an alternative writ of mandamus directed to the defendant, the Kansas Natural Gas Company, commanding said defendant to proceed forthwith to re-establish and maintain the rate of 35 cents per thousand cubic feet of natural gas furnished to said distributing companies at the city gates of said cities, until consent to change the said rate has been obtained from the Public Utilities Commission of the State of Kansas, or to show cause to this Court on or before the — day of April, 1922, why it does not do so. A. A. Helm, Attorney for Public Utilities Commission of the State of Kansas.

STATE OF KANSAS,
Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing petition and knows the contents thereof and that the matters therein stated are true. A. E. Helm.

Subscribed and sworn to before me this 25th day of April, 1922.
Cora M. Johnson, Notary Public. My Commission expires Nov. 28, 1925.

[File endorsement omitted.]

11 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Motion for an Incidental Order.

Directing the Defendant to Maintain the Rates and Service Heretofore Charged and Furnished for Natural Gas to the Distributing Companies Named in the Petition Filed Herein.

[Filed Apr. 25, 1922.]

Comes now the plaintiff in the above entitled action and shows to the Court that the defendant, the Kansas Natural Gas Company,

has served notice upon the distributing companies named in the petition filed herein, that it intends to and will shut off and discontinue the furnishing of natural gas to the distributing companies named in said petition from and after this 25th day of April, 1922, unless said distributing companies enter into an agreement with the said Kansas Natural Gas Company to pay the higher rate of 40 cents per thousand cubic feet of natural gas at the city gates. That unless the said Kansas Natural Gas Company is directed and commanded by an order of this Court to continue to furnish natural gas to said distributing companies at the rate heretofore charged at the city gates for such gas, the said Kansas Natural Gas Company will shut off and discontinue the furnishing of natural gas to said distributing companies on and after this date.

Wherefore, the plaintiff moves the Court and prays for an incidental order to be entered herein, directing and commanding the Kansas Natural Gas Company to continue to furnish natural gas to said distributing companies at the rate of 35 cents per thousand cubic feet at the city gates, and not to shut off or discontinue the furnishing of natural gas to said distributing companies, pending the final determination of the proceedings involved in the above entitled case. A. E. Helm, Attorney for the Public Utilities Commission of the State of Kansas.

12 STATE OF KANSAS,
 Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing motion, and knows the contents thereof and that the matters therein stated are true. A. E. Helm.

Subscribed and sworn to before me this 25th day of April, 1922. D. A. Valentine, Notary Public, Clerk Supreme Court. My Commission expires — —, ——. (Seal.)

[File endorsement omitted.]

13 Be it further remembered that on the 25th day of April, 1922, the same being one of the regular judicial days of the January, 1922, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remains of record in the words and figures as follows to-wit:

10 Order Allowing Petition for Alternative Writ.

14 In the Supreme Court of the State of Kansas, Tuesday, April
25, 1922.

No. 24307.

[Title omitted.]

Journal Entry of Order Allowing Writ, etc.

[Filed Apr. 25, 1922.]

Now comes the plaintiff herein and presents its verified petition praying for an alternative writ of mandamus herein; and thereupon after oral argument by A. E. Helm for the petition, and by Robert D. Garver, contra it is ordered that the alternative writ of mandamus issue to the defendant as prayed for in said petition, returnable on the 1st day of May, 1922. It is further ordered that the defendant, The Kansas Natural Gas Company, be and it is hereby commanded to continue to furnish natural gas to the said distributing company at the city gates at the rate of 35¢ per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing company pending the final determination of the issues involved in this case.

15 Be it further remembered, that on the 25th day of April 1922, there was issued by the said Supreme Court of the State of Kansas, an Alternative Writ of Mandamus, together with an Incidental order, to the defendant, which Alternative Writ of Mandamus, and Incidental Order, are in the words and figures as follows, to-wit:

16-25 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Alternative Writ of Mandamus.

[Filed Apr. 25, 1922.]

Whereas, There has been filed in this court a petition and motion for alternative writ of mandamus in words and figures as follows, to wit:

[Omitted; printed p. 2.]

26 And it being agreeable to me that justice be speedily done
in the premises, and that all lawful relief be speedily granted
to the plaintiffs in this petition:

Now, therefore, you, The Kansas Natural Gas Company, are hereby commanded to proceed forthwith to reinstate and reestablish the rate of Thirty-five Cents (35¢) per thousand cubic feet at

the city gates for natural gas furnished by you to the distributing companies named in said petition, and to maintain said rate in effect until the consent of the Public Utilities Commission for the State of Kansas shall have been obtained to change the same, or that you show cause to this court on or before the 1st day of May, 1922, why you should not do so, and then and there return this writ. W. A. Johnston, Chief Justice.

Service of above Writ acknowledged for Kansas Natural Gas Co., this 25th day of April, 1922. Robert D. Garver, Attorney.

[File endorsement omitted.]

27 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Incidental Order.

(Filed Apr. 25, 1922.)

Whereas it has been made to appear to the Court that the defendant, the Kansas Natural Gas Company, intends to and will discontinue the furnishing of natural gas to the distributing companies named in the petition filed in the above entitled case unless said distributing companies immediately enter into an agreement with the Kansas Natural Gas Company to pay the increased rate of 40 cents per thousand cubic feet of natural gas at the city gates:

It is therefore by the court ordered: That the Kansas Natural Gas Company be, and it is hereby, commanded to continue to furnish natural gas to said distributing companies at the city gates at the rate of 35 cents per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing companies, pending the final determination of the issues involved in the above entitled case. W. A. Johnston, Chief Justice.

Service of the above entitled order is hereby acknowledged for the Kansas Natural Gas Company. By Robert D. Garver, Attorney for Defendant.

[File endorsement omitted.]

28 Be it further remembered, that afterwards and on the 1st day of May, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Return and Answer of the Defendant to the Alternative Writ of Mandamus, which Return and Answer, are in the words and figures as follows, to-wit.

12 Return and Answer of Kansas Natural Gas Co.

29 In the Supreme Court of the State of Kansas.

No. 24,307.

Return and Answer of Defendant, Kansas Natural Gas Company, to Alternative Writ of Mandamus.

(Filed May 1, 1922.)

Comes now the Kansas Natural Gas Company and for its return to the alternative writ of mandamus heretofore issued in this cause, and hereto annexed, says:

I.

It admits all of the allegations of fact contained in paragraphs I to XXX, inclusive, of plaintiff's petition.

II.

It admits the facts alleged in paragraph XXXI of plaintiff's petition except the allegation that it is a public utility within the meaning of the Statutes of Kansas conferring jurisdiction over public utilities upon the Public Utilities Commission of the said State.

III.

It admits the allegations of fact contained in paragraph XXXII of plaintiff's petition, except that in the cities named in paragraphs VI, VIII, X, XIII, a rate other than thirty-five (\$0.35) cents was in effect, established as alleged by plaintiff.

IV.

It admits the allegations of fact contained in paragraph XXXIII of plaintiff's petition, except that no notice was sent to companies serving the cities of Coffeyville, Cherrydale, Independence, Ottawa, Olathe, Tyro, or Chanute, and no attempt made to change the existing rates in said cities.

V.

It admits the allegations of fact contained in paragraph XXXIV of plaintiff's petition.

30

VI.

It admits the allegations of fact contained in paragraph XXXV of plaintiff's petition.

VII.

It admits the allegations of fact contained in paragraph XXXVI of plaintiff's petition.

VIII.

It denies that it has wrongfully or unlawfully changed the rate formerly charged by it for gas at the city gates of said cities, but admits that it has announced an increased rate without the consent of the Public Utilities Commission, and that it will continue to charge and collect from said distributing companies the increased rate of forty (\$0.40) cents per thousand cubic feet for natural gas at the city gates of said cities unless prevented from doing so by this Honorable Court.

IX.

For answer to said alternative writ and for cause why it has not performed the things therein commanded, said Kansas Natural Gas Company respectfully represents that it is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipe line running from the State of Oklahoma, across the State of Kansas, and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipeline 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma and entered said pipeline in said State, the remainder thereof being produced in the State of Kansas and entering said pipeline in that State; that of the total amount of gas so transported, 5,164,121,000 cubic feet or forth-eight (48%) per cent was delivered in the State of Kansas, and 5,558,959,000 cubic feet, or fifty-two (52%) per cent was delivered in the State of Missouri; that said gas obtained in Oklahoma and in Kansas is intermingled in said pipeline and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of Kansas into the State of Missouri; that

31 said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates for an agreed price; that the figures above given for the year ending December 31st, 1921, represents an average year, insofar as showing the relative proportion of gas delivered in Kansas and Missouri, but do not correctly represent the average relative receipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of the gas shown to have been produced in the State of Kansas was received from the Colony Field in Anderson County, Kansas, which field, at its present rate of decline, will have practically no gas available for the use of said pipeline in supplying the demand for the winter of 1922, at which time practically all of the gas supplied to

Kansas and Missouri, as shown by the 1921 figures above given, will have to be purchased in, and transported from, the State of Oklahoma.

X.

Said Kansas Natural Gas Company further alleges that its business, as above set out, constitutes commerce among the States of a national character, which is not subject to regulation by the Public Utilities Commission of the State of Kansas, and that it has the legal right to charge the several distributing companies set out in plaintiff's petition such reasonable and just rates for gas delivered to them as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority so to do.

XI.

Said Kansas Natural Gas Company further alleges that the rate of forty (\$0.40) cents per thousand cubic feet for gas delivered to the city gates of the several distributing companies set out in plaintiff's petition is a just and reasonable rate and is necessary to be charged by said Kansas Natural Gas Company in order to secure to it a reasonable return on the value of its property used and useful in connection with the service rendered, and that a less rate would be unremunerative, non-compensatory, and confiscatory.

32 Wherefore, having fully shown cause for its acts complained of by plaintiff, defendant prays that the relief sought by plaintiff herein be denied and that the several orders issued against defendant herein be set aside and for such other and further relief as to this Honorable Court may seem just and equitable. The Kansas Natural Gas Company, By H. O. Caster, Robert D. Garver, Its Attorneys.

[File endorsement omitted.]

33 Be it further remembered, that afterwards and on the 18th day of May, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Stipulation of the parties to amend the Petition for an Alternative Writ of Mandamus, which Stipulation is in the words and figures as follows to-wit:

Stipulation to Amend Petition.

15

34

In the Supreme Court of the State of Kansas

No. 24307.

[Title omitted.]

Stipulation to Amend Petition.

[Filed May 18, 1922.]

It is hereby stipulated and agreed between the parties to this action that the plaintiff may amend the original petition and motion for alternative writ of mandamus filed herein, by adding at the end of Paragraph 34 the following:

Plaintiff further alleges on information and belief that said distributing companies have not entered into any contract with said Kansas Natural Gas Company, and have not consented nor agreed to pay said Kansas Natural Gas Company said forty cents (40¢) per thousand cubic feet for said natural gas so furnished at city gates of said cities; and that said companies refused to agree so to do and refuse to pay said forty cents (40¢) per thousand cubic feet for said gas until authorized so to do by the Public Utilities Commission for the State of Kansas.

It is further stipulated by the parties hereto that said amendment may be considered the same as though it had been made a part of the original petition and the alternative writ issued thereunder, and that the answer of defendant to said alternative writ may be treated as an answer to said amended petition, and further that the making of such amendment under this stipulation shall in no manner affect or change the time of hearing of the case as now assigned by the Supreme Court of the State of Kansas. A. E. Helm, Attorney for Plaintiff. H. O. Caster, Robert D. Garver, Attorneys for Defendant.

[File endorsement omitted.]

35

Be it further remembered, that afterwards and on the 3rd day of June, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Reply and Demurrer to the Return and Answer of the defendant, which Reply and Demurrer are in the Words and figures as follows, to-wit.

16 Reply and Demurrer to Return and Answer.

36 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

**Reply and Demurrer to the Return and Answer of Defendant,
Kansas Natural Gas Company, to Alternative Writ of Man-
damus.**

[Filed June 3, 1922.]

Comes now the plaintiff in the above entitled action and for its reply and demurrer to the return and answer of the defendant, Kansas Natural Gas Comapny, to alternative writ of mandamus, says:

I.

That it admits the allegations in Paragraph IV of said return and answer of the defendant.

II.

That it denies that defendant has not wrongfully or unlawfully charged the rate formerly charged by it for gas at the city gates of said cities as alleged in Paragraph VIII of said return and answer.

III.

That it admits the allegations in Paragraph IX of said return and answer, so far as said allegations relate to the business of the defendant in buying, transporting and selling natural gas in the states of Oklahoma, Kansas and Missouri, and the maintenance by the defendant of a pipe line running from the state of Oklahoma across the state of Kansas and into the state of Missouri, and the relative portion of gas transported and sold in the states of Kansas and Missouri, and the intermingling of the natural gas produced or obtained in Oklahoma and in Kansas, and that said gas flows in a common stream from the state of Oklahoma into the state
37 of Kansas, through the state of Kansas into the state of Missouri, and that the said Kansas Natural Gas Company does not have a franchise from any city or town in the state of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates; but plaintiff denies that said gas is sold to said distributing companies other than at the price approved by the Public Utilities Commission for the state of Kansas.

Plaintiff further alleges that the allegations in said Paragraph IX, relating to the relative receipts of gas from Oklahoma and Kansas for the year ending December 31, 1921, as compared with

the relative receipts of gas from Oklahoma and Kansas in the future, are immaterial to any issue involved in this case, and therefore constitute redundant and surplus matter, which plaintiff asks to have stricken from said return and answer.

IV.

That it denies the allegations contained in Paragraph X of said return and answer.

V.

Plaintiff demurs to the allegations contained in Paragraph XI of said return and answer for the reason that this court is without jurisdiction to determine the question of the reasonableness of the proposed 40 cents per 1,000 cubic feet of natural gas delivered to the city gates of the several distributing companies set out in plaintiffs' petition, or whether a less rate would secure to the defendant a reasonable return on the value of its property used and useful in connection with the service rendered, or whether a less rate would be unremunerative, noncompensatory and confiscatory in the absence of any showing that the defendant had made application to the Public Utilities Commission for the state of Kansas for permission to increase its rates, and that that Commission had refused to authorize the collecting by the defendant of a reasonable, remunerative, compensatory and nonconfiscatory rate. A. E. Helm, Attorney for Plaintiff.

[File endorsement omitted.]

Be it further remembered, that afterwards and on the 7th day of June, 1922, there was filed in the office of the Clerk of the Supreme court of the State of Kansas, a Stipulation of the parties as to facts, which Stipulation is in the words and figures as follows to-wit:

In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Stipulation as to Facts.

[Filed June 7, 1922.]

The following facts are stipulated to be true by the parties hereto:

It is agreed that the pipe lines of the distributing companies serving the several cities involved herein are permanently attached to and connected with the pipelines of the defendant, and that the natural gas transported and sold by the defendant moves in a con-

tinuous stream through the pipe lines of the defendant and the pipe lines of said distributing companies from the points where said gas is obtained by the defendant to the burner tips where the same is consumed and used by the customers of said distributing companies; that the only interruptions in the flow of said gas are such as are occasioned by the use of compressors pressure reduction devices and meters used for the measurement of the gas at the gates of the cities and to the customers of the several distributing companies. A. E. Helm, Attorney for Plaintiff. Robert D. Garver, Attorney for Defendant.

[File endorsement omitted.]

41 Be it further remembered, that on the 7th day of June, 1922, the same being one of the regular judicial days of the January, 1922, term of the Supreme Court of the State of Kansas, the said Supreme Court being in session in its court room in the city of Topeka, the following proceedings among others was had, and remains of record in the words and figures as follows to-wit:

42 In the Supreme Court of the State of Kansas, Wednesday,
June 7, 1922.

[Title omitted.]

Journal Entry of Submission.

This cause comes on to be heard upon the pleadings filed herein; and thereupon after oral argument by A. E. Helm and J. W. Dana for the plaintiff, and by Robert D. Garver for the defendant, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

43 Be it further remembered, that afterwards and on the 8th day of July, 1922, the same being one of the regular judicial days of the July, 1922, term of the Supreme Court of the State of Kansas, said court being in session in its court room in the City of Topeka, the following proceedings among others was had and remains of record, in the words and figures as follows, to-wit:

44 In the Supreme Court of the State of Kansas, Sat., July 8, 1922.

No. 24307.

[Title omitted.]

Journal Entry of Judgment.

[Filed July 8, 1922.]

This cause comes on for decision, and thereupon it is ordered and adjudged that the demurrer of the plaintiff to the answer of the defendant be sustained. It is further ordered that the clerk of the court issue a peremptory writ of mandamus commanding the defendant to reestablish and maintain a rate of 35¢ per thousand cubic feet for gas delivered to the distributing companies operating in cities of this state, until a different rate be fixed by order of the Public Utilities Commission. It is further ordered that the defendant pay the costs of this case in this court taxed at \$— and hereof let execution issue.

45 Be it further remembered that afterwards, and on the 8th day of July, 1922, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the written opinion of the court with the syllabus attached, which opinion and syllabus is in the words and figures as follows, to-wit:

46 [Title omitted.]

Original Proceeding in Mandamus.

Writ Allowed.

Opinion.

[Filed July 8, 1922.]

Syllabus by the Court.

MARSHALL, J.: The State through the public utilities commission has the power to regulate the sale of natural gas in this state by fixing a reasonable price therefor where the gas is produced in Oklahoma, transported through pipe lines into this state, and here sold to distributing companies that in turn sell the gas to the consumers thereof in a large number of cities in this state.

All the justices concurring.

A true copy. Attest: — — —, Clerk Supreme Court.

Filed Sat., July 8, 1922.

The opinion of the court was delivered by

MARSHALL, J.: Plaintiff seeks to compel the defendant to re-establish and maintain a rate of thirty-five cents a thousand for gas delivered by it to distributing companies operating in a number of cities in the eastern part of the state. The defendant has filed its return and answer to the petition of the plaintiff. To that return and answer, the plaintiff has filed a combined reply and demurrer. The cause is presented on the demurrer to the answer.

The facts disclosed by the pleadings, so far as necessary to state them for the consideration of the matters presented, are as follows: The defendant is producing gas in Oklahoma and Kansas and transmitting it from Oklahoma through Kansas and into Missouri and is supplying towns and cities in Oklahoma, Kansas, and Missouri, with natural gas. The defendant does not furnish gas to the consumers; it sells gas to the distributing companies in various cities, and these companies deliver the gas to the consumers. The pipe lines conveying the gas are continuous from the wells to the place of consumption. The rate, fixed by order of the federal court and approved by the public utilities commission, has been thirty-five cents per thousand cubic feet of gas to companies distributing and selling gas in various cities in this state. That was the legal rate. On April 1, 1922, defendant notified the various distributing companies that after the April 1, 1922, meter reading, the rate charged would be forty cents per thousand cubic feet. Upon that notice being given, this action was commenced to compel the defendant to deliver gas to the distributing companies for thirty-five cents per thousand cubic feet.

The plaintiff argues—

"1. That the defendant is a public utility under the laws of Kansas, and that its business of selling natural gas, transported in interstate commerce, is subject to regulation by the Public Utilities Commission of the state of Kansas.

48 "2. That the business of selling natural gas by the defendant to the distributing companies at the gates of the cities served by said distributing companies is local and not national in character.

"3. That until congress asserts its jurisdiction over the subject and provides for the regulation of the sale of natural gas in interstate commerce, the states may enact laws providing for the reasonable regulation of the business."

The defendant contends that—

"The business of The Kansas Natural Gas Company is national in character and not subject to direct regulation by the state."

The controversy revolves around this question: Does the state of Kansas have power to regulate the price at which gas shall be sold by the defendant to the distributing companies? It is admitted by

all the parties that the business of the defendant in transporting natural gas is interstate commerce. In *The State, ex rel., v. Flannelly*, 96 Kan. 372, 152 Pac. 22, it was said:

"Assuming that the sale of natural gas produced in Oklahoma, from there transported into this state through pipe lines and here sold to consumers throughout the state is interstate commerce, it is not national in its nature, it does not admit of one uniform system of regulation, it is not that kind of interstate commerce which required exclusive legislation by congress, and until congress acts it is under the control of this state." (Syl. 5.)

That decision was adhered to by this court in *The State, ex rel., v. Gas Co.*, 100 Kan. 593, 155 Pac. 1111.

Congress has not attempted to regulate the production, transportation, or sale of natural gas. Many of the states have passed laws governing these matters. The legislation by the states demonstrates that the sale of natural gas should be regulated. The regulations made are not uniform; they cannot be uniform. Regulation is necessary; Congress has not regulated; the states must regulate. Under these circumstances regulation by the states does not violate the commerce clause of the constitution. Some other provision of the constitution may be violated, but that is an altogether different question.

In *Public Utilities Comm. v. Landon*, 249 U. S. 236, 245, the supreme court of the United States said:

"That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies *companies* free from unreasonable interference by the State. *American Express Co. v. Iowa*, 196 U. S. 133, 143; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224, U. S. 217.

"But in no proper sense can it be said, under the facts here disclosed, that sale and delivery of gas to their customers at burner tips by the local companies operating under special franchises constituted any part of interstate commerce."

In *Penna. Gas Co., v. Pub. Service Comm.*, 252 U. S. 23, 28, the Supreme Court of the United States used this language:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipe lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105.

"This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of

the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

In the last case, gas was produced in Pennsylvania, was transported through pipe lines to Jamestown, N. Y., and there was sold direct to the consumer by the producing company. There was no intervening distributing company. That case involved the validity of an order made by the public service commission of New York regulating the rates at which the Pennsylvania Gas Company should furnish gas to its customers in the city of Jamestown. The head-note to the opinion reads:

"The transmission and sale of natural gas, produced in one State and transported and furnished directly to consumers in a city of another State by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce; but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates."

The only difference between the present case and the Pennsylvania Gas Company case is that here the gas is sold to distributing companies who in turn sell it to the consumer, while in the Pennsylvania Gas Company case, the gas was sold directly to the consumer. So far as the Kansas Natural Gas Company is concerned, the distributing companies in this state may be considered the consumers of the gas sold. If that is correct, there is no difference between the present case and the Pennsylvania Gas Company case.

Attention is directed to an opinion of the Honorable John C. Pollock, Judge of the United States district court for the district of Kansas, in *Central Trust Company of New York v. The Central Light, Heat and Power Company*, in which that court held that the business of the Kansas Natural Gas Company in selling gas to the several distributing companies within the State of Kansas is interstate commerce and is not subject to the control of the state through the public utilities commission. That opinion is largely based on *Public Utilities Comm. v. Landon*, 249 U. S. 236, and *Penna. Gas Co. v. Pub. Service Comm.*, 252 U. S. 23.

This court reaches a conclusion different from that of the United States district court, based on the same cases and on the facts that Congress has not attempted to regulate the sale of natural gas and that the regulation of its sale is necessary and cannot be uniform or national in its character. Until Congress does act in the matter, the State has power to regulate the sale of natural gas in this state by the Kansas Natural Gas Company.

The demurrer of the plaintiff to the answer of the defendant is sustained; and a peremptory writ of mandamus is allowed, commanding the defendant to re-establish and maintain a rate of thirty-five cents a thousand for gas delivered by it to the distributing companies

operating in the cities of this state until a different rate in fixed by order of the public utilities commission.

All the justices concurring.

A true copy. Attest: — — —, Clerk Supreme Court.

52 Be it further remembered: that afterwards and on the 15th day of July, 1922, the same being one of the regular judicial days of the July, 1922 term of the Supreme Court of the State of Kansas; said court being in session in its court room in the city of Topeka, the following proceedings among others was had and remains of record in the words and figures as follows, to-wit:

53 In the Supreme Court of the State of Kansas, Saturday, July 15, 1922.

No. 24307.

[Title omitted.]

Journal Entry.

[Filed July 15, 1922.]

It appearing to the court that some of the distributing companies in Kansas, receiving gas from the defendant, The Kansas Natural Gas Company are tendering payment therefor at the rate of thirty-five cents per thousand cubic feet, by checks bearing endorsements which are in effect a receipt in full for all gas received and are refusing to pay for such gas without such endorsement, and it further appearing that said Kansas Natural Gas Company has refused the acceptance of such tenders on the ground that the acceptance of the same would constitute an accord and satisfaction and would bar it from litigating its claimed legal rights, the court finds that all such distributing companies receiving gas from said Kansas Natural Gas Company should pay for the same at the rate of thirty-five cents per thousand cubic feet, which said distributing companies admit and contend to be legal rate now in effect, and that such payments should be made by said distributing companies and may be received by said Kansas Natural Gas Company without prejudice to the rights of either party to this litigation or any appeal that may be taken therefrom. And the court further finds that nothing in any order heretofore issued in this case prohibits the Kansas Natural Gas Company from using lawful means for enforcing the collection of its accounts against said distributing companies.

54 In the Supreme Court of the State of Kansas.

No. 24304.

[Title omitted.]

Clerk's Certificate.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full true and complete transcript of the record and proceedings in the above entitled case and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, at my office in the city of Topeka, this 24th August, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

55 Here follow:

The Original Petition for a Writ of Error.

The Original Order allowing the writ of error, and fixing the amount of the Bond for Appeal.

The Original Assignments of errors.

A. Copy of the Bond for Appeal.

The Original Writ of Error.

The Original Citation, with the acknowledgment of service thereof.

56 [File endorsement omitted.]

In the Supreme Court of the State of Kansas.

No. 24,307.

[Title omitted.]

Original Proceeding in Mandamus.

Petition for the Allowance of Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas.

(Filed Aug. 12, 1922.)

To the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Now comes the Kansas Natural Gas Company, the above named Defendant, by its attorneys, H. O. Caster and Robert D. Garver, and respectfully shows; that heretofore, to-wit: on the 8th day of July, 1922, in the above entitled cause, final judgment was rendered against your petitioner by the Supreme Court of the State of

Kansas, that being the highest court of law or equity in the State of Kansas, in which final order and judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Petitioner further shows that a federal question was made in said case in that the Plaintiff herein, the State of Kansas, in its petition alleged that your petitioner, being engaged in the business of transporting gas by pipeline from the State of Oklahoma, through the State of Kansas, and into the State of Missouri and supplying certain distributing companies in the State of Kansas with natural gas for local distribution, was attempting to increase its city gate rate to be charged said distributing companies for said gas from the price of thirty-five cents per thousand cubic feet to the price of forty cents per thousand cubic feet, without submitting said increased rate to the Public Utilities Commission of the State of Kansas and without the approval or consent of said Public Utilities Commission and prayed for a writ of mandamus compelling your petitioner to reinstate its thirty-five cent city border rate until such time as it secured the consent and approval of the Public Utilities Commission of the State of Kansas to charge the same; upon this petition an alternative writ of mandamus was issued and served upon your petitioner, to which alternative writ of mandamus your petitioner, in due time filed its return and answer setting up that it was engaged in the purchase, production, transportation and sale of natural gas in commerce among the states of Oklahoma, Kansas and Missouri, that its business was of a national character and was not subject to direct regulation by the State of Kansas, and that its business was of such a character that direct regulation thereof could only be exercised by the Federal Congress and was not subject to the regulation attempted by the Public Utilities Commission of the State of Kansas; to

57 & 58 this return and answer of your petitioner, the State of

Kansas filed its demurrer and answer and this cause was submitted to the Supreme Court of the State of Kansas upon said demurrer, which said court on the day above set out entered its final judgment, denying the right of your petitioner to charge any price for the commodity it transported in interstate commerce and sold in the State of Kansas, without first securing the approval and consent of the Public Utilities Commission of said State thereto and holding that the regulation attempted by the State of Kansas through the Public Utilities Commission by establishing the price your petitioner might charge for natural gas transported by it in interstate commerce was not repugnant to the commerce clause of the Federal Congress, vesting in Congress the right to regulate commerce with foreign nations and among the several states and that a decision of said Federal question was necessary to the judgment rendered, whereby manifest error has happened to the great damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of

Order Allowing Writ of Error.

error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and the Judges thereof, to the end that the record in said matter may be removed to the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment reversed and the writ of mandamus prayed for in said proceeding denied; and your petitioner will ever pray. Kansas Natural Gas Company, Petitioner, by H. O. Caster, Robt. D. Garver, Its Attorneys.

59 [File endorsement omitted.]

60 & 61 [File endorsement omitted.]

In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

Order Allowing Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Kansas.

(Filed Aug. 12, 1922.)

The above entitled matter coming on to be heard upon the petition of the Kansas Natural Gas Company, Defendant in the above entitled cause for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the question presented by the record in said matter;

It is ordered that a writ of error be and hereby is allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

62 [File endorsement omitted.]

63 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

**Assignment of Errors on Writ of Error from Supreme Court
of the United States to the Supreme Court of the State of
Kansas.**

[Filed Aug. 12, 1922.]

Now comes the Kansas Natural Gas Company, defendant in the above entitled cause and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Kansas, in the above entitled matter, there is manifest error in this, to-wit:

First.

The court erred in holding that the State of Kansas, through its Public Utilities Commission, has the power to regulate the sale of natural gas in said State by fixing the price which the Kansas Natural Gas Company might charge therefor, where the gas is produced in Oklahoma, transported through pipelines into the State of Kansas and is sold to distributing companies that in turn sell the gas to the consumers thereof in a number of cities in said State, said Kansas Natural Gas Company holding no franchises from any cities in said State and not itself engaging in the sale or distribution of the gas transported by it, other than the sale to such distributing companies.

Second.

The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was subject to direct regulation by the State of Kansas.

Third.

The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was not national in its nature, does not admit of one uniform system of regulation and is not that kind of interstate commerce which requires exclusive legislation by Congress. And in holding that until Congress acts, such business is under the control and regulation of the State of Kansas.

64 & 65

Fourth.

The court erred in holding that the several distributing companies to which the Kansas Natural Gas Company sells its gas are to be considered the consumers of the gas so sold, and that the Kansas Natural Gas Company is subject to the same regulation as it would be, if, under franchise granted by said respective cities, it was engaged in the distribution and sale of gas to the inhabitants of said cities, and the price which it may charge said distributing companies is subject to the same regulation as the price charged by distributing companies for the sale of gas to individual consumers at the burners' tip.

Fifth.

The court erred in sustaining the demurrer of the State of Kansas to the return and answer of the Kansas Natural Gas Company to the alternative writ of mandamus herein.

Sixth.

The court erred in allowing and issuing a peremptory writ of mandamus herein requiring the Kansas Natural Gas Company to reestablish and maintain a rate of thirty-five cents per thousand cubic feet for gas delivered it by the distributing companies in the cities of said State until a different rate is fixed by order of the Public Utilities Commission of said State.

For which errors the defendant, Kansas Natural Gas Company prays the said judgment of the Supreme Court of the State of Kansas, dated the 8th day of July, 1922, be reversed and a judgment rendered in favor of said Kansas Natural Gas Company denying the writ of mandamus prayed for herein and for costs. H. O. Caster, Rob't. D. Garver, Attorneys for the Kansas Natural Gas Company.

66 [File endorsement omitted.]

67 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Original Proceeding in Mandamus.

Bond on Writ of Error.

[Filed Aug. 12, 1922.]

Know all men by *there* presents, that we, the Kansas Natural Gas Company, a corporation as principal and the American Surety Company of New York, as surety, are held and firmly bound unto the State

of Kansas in the sum of One Thousand (\$1,000.00) Dollars, to be paid to said obligee, its representatives and assigns; to the payment of which well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 31 day of July, A. D. 1922.

Whereas the above named, the Kansas Natural Gas Company has prosecuted a Writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas.

Now, therefore the condition of this obligation is such that if the above named the Kansas Natural Gas Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea; then this obligation shall be void; otherwise to remain in full force and effect. Kansas Natural Gas Company, By H. R. Straight, Vice President. Attest: L. W. Ramsey, Asst. Secretary. [Seal.] American Surety Company of New York, By J. G. Condit, Its Attorney in fact. Countersigned: W. T. Spies.

68 STATE OF OKLAHOMA,
County of Washington, ss:

On the 11th day of August, 1922, before me personally appeared H. R. Straight, to me known to be the person described in and who executed the foregoing bond and known to me to be the Vice President of the Kansas Natural Gas Company, a corporation, and acknowledged that he executed the same as the free act and deed of said corporation. G. J. Neuner, Notary Public. [Seal.] My Commission expires 5-20-23.

STATE OF OKLAHOMA,
County of Washington, ss:

On the 31st day of July, A. D. 1922, personally appeared before me, J. G. Condit, who being duly sworn deposes and says that he is attorney in fact of the American Surety Company of New York; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that the said instrument was signed and sealed on behalf of said corporation by authority of its board of Directors and the said J. G. Condit acknowledged said instrument to be the free act and deed of said corporation. Essie Travis, Notary Public. [Seal.] My Commission expires Aug. 25th, 1924.

I hereby approve the foregoing bond and sureties this 12th day of August, A. D. 1922. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[File endorsement omitted.]

(Filed Aug. 12, 1922.)

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of the plea which is in the said Supreme Court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of Kansas on the Relation of A. E. Helm, attorney for the Public Utilities Commission, and the Kansas Natural Gas Company, wherein was drawn in question the validity of a statute of the State of Kansas, and an authority exercised under, said state, on the ground of their being repugnant to the constitution and laws of the United States, and the decision was in favor of the validity of such statute and the authority exercised thereunder; and wherein was drawn in question the construction of a clause of the constitution of the United States, and the decision was against the right, privilege and exemption specially set up and claimed under such clause of the said constitution, a manifest error hath happened to the great damage to said Kansas Natural Gas Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your

seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 11th day of September, 1922, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. William Howard Taft, Chief Justice of the said Supreme Court on the 12th day of August, in the year of our Lord, 1922. H. S. Campbell, Clerk of the District Court of the United States for the District of Kansas. [Seal of District Court U. S., District of Kansas.]

Service of within writ of error acknowledged this Aug. 12, 1922. F. S. Jackson, Attorney for Public Utilities Commission of Kansas.

72 [File endorsement omitted.]

73 & 74 [File endorsement omitted.]

Citation and Service.

(Filed Aug. 12, 1922.)

UNITED STATES OF AMERICA, ss:

The President of the United States to the State of Kansas, Greeting:

You are hereby cited and admonished to appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein the State of Kansas, on the relation of A. E. Helm, attorney for the Public Utilities Commission, is plaintiff, and the Kansas Natural Gas Company is defendant, to show cause, if any there be, why the judgment rendered against the said Kansas Natural Gas Company as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Johnston, Chief Justice of the Supreme Court for the State of Kansas this 12th day of August, 1922. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

Service of above citation acknowledged this Aug. 12, 1922. F. S. Jackson, Atty. for Public Utilities Com. for Kansas.

75 [File endorsement omitted.]

76 **Certificate of Lodgment.**

STATE OF KANSAS, ss:

Supreme Court.

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that there was lodged with me as such Clerk, on August 12th, 1922, in the above entitled case—

1. The Original Bond for appeal a copy of which is herein set forth, and

2. Two copies of the Writ of Error, as herein set forth one for the plaintiff and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court of the State of Kansas, in the City of Topeka, this 24th day of August, A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

UNITED STATES OF AMERICA, ss:

Supreme Court of Kansas.

In obedience to the commands of this writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said Supreme Court of Kansas, this 24th day of August A. D. 1922. D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. [Seal of the Supreme Court, State of Kansas.]

78 & 79 In the Supreme Court of the State of Kansas.

No. 24307.

[Title omitted.]

Order Extending Time.

Now on this 9th day of September, 1922, on application of both Plaintiff and Defendant, and for good cause shown, the time within which the Kansas Natural Gas Company may file its record on appeal herein to the Supreme Court of the United States, is hereby enlarged and extended to October 11, 1922, and the time within which appellee, the State of Kansas, is cited to enter its appearance in said Supreme Court is likewise extended. W. A. Johnston, Chief Justice Supreme Court of Kansas.

O. K. F. S. Jackson, attorney for Public Utilities Commission of the State of Kansas. Robt. D. Garver, attorney for Kansas Natural Gas Company.

80 [Endorsement omitted.]

Endorsed on cover: File No. 29,192. Kansas Supreme Court. Term No. 642. The Kansas Natural Gas Company, plaintiff in error, vs. State of Kansas on the relation of A. E. Helm, attorney for the Public Utilities Commission of the State of Kansas. Filed October 6th, 1922. File No. 29,192.

Office Supreme Court, U. S.

FILED

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WM. R. STANFORD

CLERK

No. 651 133

In the Supreme Court of the United States

THE KANSAS NATURAL GAS COMPANY, Plaintiff in Error.

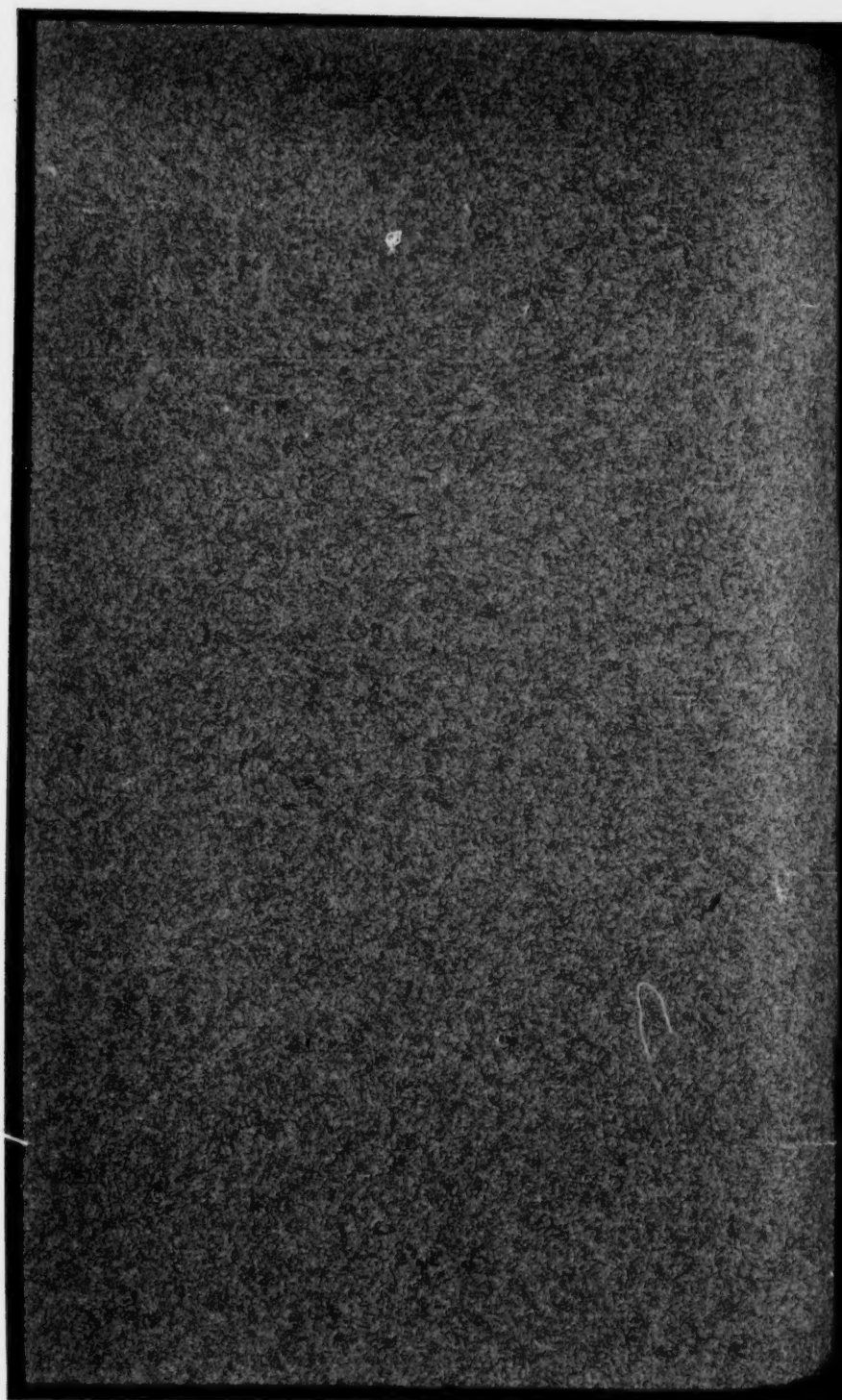
vs.

STATE OF KANSAS, on the relation of A. E. HELM, Attorney for
the Public Utilities Commission of the State of Kansas.

Error from the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

FRED S. JACKSON,
Attorney for Defendant in Error.



In the Supreme Court of the United States

THE KANSAS NATURAL GAS COMPANY, *Plaintiff in Error*,
vs.

STATE OF KANSAS, on the relation of A. E. HELM, Attorney for
the Public Utilities Commission of the State of Kansas.

No. 642.

Error from the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR.

The brief of the plaintiff in error sufficiently presents the case without further statement. The syllabus of the state court is as follows (rec. 19):

"The state, through the Public Utilities Commission, has the power to regulate the sale of natural gas in this state by fixing a reasonable price therefor where the gas is produced in Oklahoma, transported through pipe lines into this state, and here sold to distributing companies that in turn sell the gas to the consumers thereof in a large number of cities in this state."

The question presented is identical with the one decided by this court in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, with the exception that in that case the gas company was engaged not only in the transportation of natural gas by pipe line into the state of New York, but also in the distribution of the same to the actual consumers within the city of Jamestown, N. Y. The state of Kansas in the instant case asserts that the distinction between the two cases is not material, because in each the subject of regulation was interstate commerce, and for the further reason that while the plaintiff in error in this case is not engaged in the distribution of gas to domestic consumers within any one city, it is engaged in a service which under the laws of the state of Kansas

is a public service, and one which makes the company engaged therein a public utility subject to regulation under the public utilities statute.

The issues, therefore, may be more particularly defined as follows:

ISSUES OF LAW INVOLVED.

The defendant in error contends:

1. That the defendant is a public utility under the laws of Kansas, and that its business of selling natural gas, transported in interstate commerce, is subject to regulation by the Public Utilities Commission of the state of Kansas.

2. That the business of selling natural gas by the defendant to the distributing companies at the gates of the cities served by said distributing companies is local and not national in character.

3. That until congress asserts its jurisdiction over the subject and provides for the regulation of the sale of natural gas in interstate commerce, the states may enact laws providing for the reasonable regulation of the business.

The plaintiff in error contends:

1. That it is not a public utility under the provisions of the public-utility law of the state of Kansas, and not subject to regulation by the Public Utilities Commission for the state of Kansas.

2. That it is engaged in commerce among the states of Oklahoma, Kansas and Missouri, which is of a national character and not subject to regulation by the states.

THE GAS COMPANY IS A PUBLIC UTILITY UNDER THE LAWS OF KANSAS.

The defendant, the Kansas Natural Gas Company, is a public utility as defined in section 3, chapter 238, Laws of 1911, which declares that:

"The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, except for private use, any equipment, plant, generating machinery, or any part thereof for the conveyance of oil and gas through pipe lines in or through any part of the state, except pipe lines less than fifteen miles in length and not operated in connection with or for the general commercial supply of gas or oil."

In the case of the *City of Cimarron v. Water, Light and Ice Com-*

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pany, 110 Kan. 812, reported in advance sheets for March, 1922, the court said:

"The substance of the plaintiff's principal contention may be thus stated: . . . The company in supplying the current to the city was not acting as a public utility, serving the city as one of the public whom it was under legal obligation to supply on the same terms as its other customers."

Replying to this contention the court said:

"The company, in arranging to supply the city with electricity, whether for its own use or to be distributed among its residents, was acting in its character as a public utility. It could not make a discriminatory contract with a city any more than with any other consumer."

The gas company is engaged in a public business, and is therefore subject to regulation independent of the statute. However, this statute clearly states that the term "public utility" as used in the public-utility act shall include every corporation, etc., that may own, control, operate or manage any equipment, plant, generating machinery, or any part thereof, for the conveyance of oil and gas through pipe lines in or through any part of the state. It would, therefore, seem to be definitely settled by the provisions of this statute and the decisions of the court construing the same that the defendant is a public utility under the laws of this state and is subject to regulation by the Public Utilities Commission.

THE SALE OF NATURAL GAS IS LOCAL IN ITS NATURE.

In *The State, ex rel., v. Flannelly*, 96 Kan. 372, and *The State, ex rel., v. Gas Company*, 100 Kan. 593, this court held that the business of the Kansas Natural Gas Company is not "national in its nature; does not admit of one uniform system of regulation; it is not that kind of interstate commerce which requires exclusive legislation by congress, and until congress acts it is under the control of the state." *North Carolina Public Service Commission v. Southern Power Company*, the United States circuit court of appeals for the fourth circuit, 282 Fed. 837, is in point in this case. The defendant was a New Jersey corporation, operating a large hydroelectric power plant in North Carolina. It furnished, delivered and sold power to the city gates of numerous cities for local distribution and sale. The local companies' rates were regulated by the North Carolina corporation commission.* The supply company notified the distributing companies of an increase in rates and threatened to shut off the current if the rates were not promptly paid. The court held

that the supply company was a public-service corporation, doing business affected with the public interest, and that it could not increase its city-gate rates to the local distributing companies without the order and approval of the state corporation commission.

THE RATES CHARGED BY THE GAS COMPANY TO THE DISTRIBUTING COMPANIES AT THE GATES OF THE CITIES ARE SUBJECT TO REGULATION BY THE PUBLIC UTILITIES COMMISSION.

The power of the Public Utilities Commission to regulate the rates charged for natural gas transported from one state to another and sold in the latter state has been the subject of frequent litigation recently. The history of the litigation of the *Pennsylvania Gas Company v. The Public Service Commission of New York* affords the most recent and the fullest discussion of the power of the commission to regulate the sale of natural gas transported in interstate commerce. Natural gas was produced in the state of Pennsylvania and transported by pipe lines by the Pennsylvania Gas Company to the city of Jamestown, N. Y., where it was sold directly from the distributing pipe lines of the gas company to consumers. Complaint was made to the public-service commission by a consumer, claiming that the rates charged were excessive, and asking that the same be reduced by order of the commission. The public-service commission held that:

"The fact that natural gas is brought in from another state does not, in the absence of congressional action, deprive a New York commission of jurisdiction to fix a proper rate to be charged therefor." (P. U. R. 1917F, 611.)

At a special term of the New York supreme court, upon application of the gas company for a writ of prohibition to restrain the commission from the exercise of jurisdiction beyond its power, the court held that:

"A state public-service commission has no power to fix the price of natural gas sold by a citizen of another state to a citizen within the state, since this is interstate commerce; and it is immaterial that congress has never legislated upon the subject."

This decision was reversed by the supreme court, appellate division, third department (184 App. Div. 556, 171 N. Y. Supp. 1028). An appeal was taken from the latter decision to the New York court of appeals (*Re Penn. Gas Co.*, 225 N. Y. 397, 122 N. E. 260). The case is also reported in P. U. R. 1919C, 663. The court of appeals, in affirming the order of the supreme court, appellate division, held:

1. "The transportation of gas from one state to another and the sale in one state for consumption in another is interstate commerce."

2. "In the absence of congressional action, a state may regulate the price of gas sold within its borders, although transported from another state."

The decision of the New York court of appeals was affirmed by the supreme court of the United States in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. Ed. 434. The decision by the New York court of appeals, *Re Pennsylvania Gas Company*, supra, contains a full and complete discussion of former decisions and the principles of law applicable to the case. No excerpt from the decision will adequately present the holdings of the commission. We are, therefore, for the convenience of the court, setting out in this brief the opinion in full, which is as follows:

"CARDOZO, J.: The Pennsylvania Gas Company is a Pennsylvania corporation which supplies natural gas to the inhabitants of the city of Jamestown. Its gas fields and wells are in Pennsylvania, and its gas is conveyed to Jamestown through pipe lines. About forty-five miles of line are in Pennsylvania and about five in New York. It has a branch office in Jamestown, and its mains and pipes are in the city's streets. Formerly its rates for gas were 30 cents a thousand. Recently it attempted to raise its rates to 35 cents, and filed a schedule with the public-service commission accordingly. A citizen of Jamestown, alleging that the new rates were exorbitant, lodged a complaint with the commission. The gas company was directed to answer the complaint. It filed with the commission a demurrer to the jurisdiction, which the commission overruled. Thereupon the company sued out a writ of prohibition. Its petition alleges that the attempted regulation of its rates is an unconstitutional interference with interstate commerce. The writ was granted at special term (102 Misc. 37, P. U. R. 1918D, 501, 169 N. Y. Supp. 820) and vacated at the appellate division (184 App. Div. 556, 171 N. Y. Supp. 1028). An appeal to this court followed.

"(1) 1. We think the petitioner's business is 'interstate commerce.' There is no doubt that the transportation of oil or gas from state to state through the medium of pipe lines is commerce between the states. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, 35 L. R. A., n. s., 1193, 31 Sup. Ct. Rep. 564; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. Ed. 738, 32 Sup. Ct. Rep. 442; *Haskell v. Cowham*, 109 C. C. A. 235, 187 Fed. 403. It is true that there is a distinction to be noted. What is regulated by this statute (Public Service Commissions Law [Consol. Laws, chap. 48], par. 65) is not the act of transportation; it is the sale of the thing transported (*Manufacturers' Light & Heat Co. v. Ott*, [D. C.] 215 Fed. 940, 944). But the sale of commodities to be delivered by the seller in one state to the buyer in another is also interstate commerce. *Leisy v. Hardin*, 135 U. S. 100, 34 L. Ed. 128,

3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, 32 Sup. Ct. Rep. 715; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. Ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918C, 617. It is therefore subject, like the business of transportation, to the power of the nation.

"Interstate commerce does not end until the subject matter of the sale has been broken up or redistributed or absorbed in the common mass of property within the state. *Leisy v. Hardin*, supra. When that moment arrives is not always easy to determine. The test to be applied will vary with the method of transportation and the subject of the sale. The keg of beer transported from one state to another is withdrawn from interstate commerce when its contents are sold by the glass. (Ibid.) Tobacco, imported in bulk, becomes subject to the plenary power of the states when the bulk is broken and the tobacco sold at retail. *Rast v. Van Deman & L. Co.*, 240 U. S. 342, 362, 60 L. Ed. 679, 688, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455; *Armour & Co. v. North Dakota*, 240 U. S. 510, 517, 60 L. Ed. 771, 776, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916D, 548. But the rule of the 'original package' is not an ultimate principle. It is an illustration of a principle. It assumes transmission in packages, and then supplies a test of the unity of the transaction. If other forms of transmission are employed there is need of other tests. *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 230, 241, 59 L. Ed. 552, 558, 35 Sup. Ct. Rep. 387, Ann. Cas. 1916C, 296, *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 558, 61 L. Ed. 480, 492, L. R. A. 1917F, 514, 37 Sup. Ct. Rep. 217, Ann. Cas. 1917C, 643. The telegram forwarded by the stock exchange in New York to the telegraph company in Boston, with the intention that the company shall transmit it to selected brokers, approved in advance by the exchange, does not lose its character as a subject of interstate commerce until it reaches the brokers' offices. *Western U. Teleg. Co. v. Foster*, 247 U. S. 105, 62 L. Ed. 1006, 1 A. L. R. 1278, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438. The continuity of the transaction is not broken by the translation of the code message into English, by its transmission, thus translated, to subscribers, or even by the option reserved by the telegraph company to refuse delivery to anyone. (Ibid.) The law does not ask itself what the parties 'may' do, but what, in the normal course of business, it is expected that they 'will' do. 'If the normal, contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to broker's office, it does not matter what are the stages or how little they are secured by covenant or bond.' *Western U. Teleg. Co. v. Foster*, supra, 247 U. S. at page 113. The essential unity of the transaction remains the final test. *Swift & Co. v. United States*, 196 U. S. 375, 399, 49 L. Ed. 518, 525, 25 Sup. Ct. Rep. 276; *Rearick v. Pennsylvania*, 203 U. S. 507, 512, 51 L. Ed. 295, 297, 27 Sup. Ct. Rep. 159.

"Subjected to that test, the transactions of the petitioner's business have the unity and directness of interstate commerce. There

is no break in the continuity of the transmission from pumping station in Pennsylvania to home and office and factory in Jamestown. A different question would arise if gas transmitted from Pennsylvania should be stored in reservoirs in New York, and then distributed to consumers as their needs might afterwards develop. The quantity stored or the period of storage might require us to hold that interstate commerce was at an end when the place of storage had been reached. *Kehrer v. Steward*, 197 U. S. 60, 65, 49 L. Ed. 663, 666, 25 Sup. Ct. Rep. 403; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091. The transactions would then be similar to those common in the oil business. We do not now determine the rule that should govern them. It is enough to hold that where there is in substance no storage, but merely transmission for immediate or practically immediate use, direct from seller to consumer, interstate commerce does not end till the gas has reached its goal. That, by the fair intendment of the petition, is the business conducted by this petitioner. It is not important that consumers do not signify in advance the precise amount that they will need. If their wants are approximately known, and the gas is transmitted, not to be held, but to be used, so that any storage that results is merely casual and incidental, the transaction is to be treated as single and continuous. We must then say, in the language of Holmes, J., in *Western U. Teleg. Co. v. Foster*, supra, that the transmission is 'as continuous and rapid as science can make it.'

"(2) 2. The question remains whether, in default of action by congress, the attempted regulation is within the police power of the state.

"The petitioner is a public-service corporation. Its rates are subject to regulation by 'some' agency of government. Congress has never occupied the field of regulation, as it has done with railroads, the telegraph and telephone lines, and even the oil companies. Act to Regulate Commerce, as amended June 29, 1906 (chap. 3591, 34 Stat. at L. 584, Comp. Stat. 1916, par. 8563), and June 18, 1910 (chap. 309, 36 Stat. at L. 539). Gas and water companies are expressly excepted. In such circumstances there is no implied exclusion of the police power of the states. The exercise of that power is, indeed, subject to conditions. It must not impose upon interstate commerce burdens new and direct rather than remote and incidental. *Leisy v. Hardin*, supra; Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 396, 400, 57 L. Ed. 1511, 1540, 1541, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. It must not discriminate against foreign products. *Brimmer v. Rebman*, 138 U. S. 78, 35 L. Ed. 862, 3 Inters. Com. Rep. 485, 5 Sup. Ct. Rep. 213; Minnesota Rate Cases, supra, 230 U. S. at page 401. It must not introduce diversity and conflict where there is need of uniformity and harmony. *Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. Ed. 996, 1004; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Inters.

Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Minnesota Rate Cases*, *supra*, 230 U. S. at page 400. But, subject to those conditions, the police power of the state survives, though the transactions brought within its grip are those of interstate commerce. Matters peculiarly of local concern are not 'left to the unrestrained will of individuals because congress has not acted.' *Minnesota Rate Cases*, *supra*, 230 U. S. at page 402. 'Our system of government is a practical adjustment by which the national authority as conferred by the constitution is maintained in its full scope without unnecessary loss of local efficiency.' *Minnesota Rate Cases*, *supra*. No general formula can tell us in advance where the line is to be drawn. 'We have no second Laplace, and we never shall have, with his *Mechanique Politique*, able to define and describe the orbit of each sphere in our political system with such exact mathematical precision.' Daniel Webster, in *Bank of Augusta v. Earle*, 13 Pet. 519, 559, 10 L. Ed. 274, 293, quoted by Henderson, 'The Position of Foreign Corporations in American Constitutional Law,' p. 117.

"We think the line must be drawn here so as to bring the attempted regulation within the power of the state. It is important to keep before us just what the state has tried to do. The rule is stated in paragraph 65 of the public-service commission law: 'Every gas corporation, every electrical corporation and every municipality shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation or municipality for gas, electricity or any service rendered or to be rendered, shall be just and reasonable and not more than allowed by law or by order of the commission having jurisdiction. Every unjust or unreasonable charge made or demanded for gas, electricity or any such service, or in connection therewith, or in excess of that allowed by law or by the order of the commission is prohibited.'

"This gas company occupies the streets of Jamestown with its mains. Even without any statute, it would be under a duty to furnish gas to the public at fair and reasonable rates. The statute might be repealed, and still the courts would have the power, if exorbitant charges were made, to give relief to the consumer. 1 Wyman, Pub. Serv. Corp., §§ 111, 113; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979, 984, 6 Sup. Ct. Rep. 553; *Armour Packing Co. v. Edison Electric Illuminating Co.*, 115 App. Div. 51, 100 N. Y. Supp. 605; *Shepard v. Milwaukee Gaslight Co.*, 6 Wis. 539, 70 Am. Dec. 479. The state in the adoption of this law has not imposed a new burden. It has not created a new duty. It has given a new 'sanction' to 'an inherent duty.' *Western U. Teleg. Co. v. Commercial Mill Co.*, 218 U. S. 406, 416, 54 L. Ed. 1088, 1091, 36 L. R. A., n. s., 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815. It has established a new administrative agency the better to ascertain and declare and enforce a duty already existing. We cannot doubt that the creation of such an agency is within the power of the state until

congress shall manifest the purpose to override its action. *Western U. Teleg. Co. v. Commercial Mill Co.*, supra; *Missouri K. & T. R. Co. v. Harris*, 234 U. S. 412, 58 L. Ed. 1377; L. R. A. 1915E, 942; 34 Sup. Ct. Rep. 790; *Southern R. Co. v. Reid*, 222 U. S. 424, 437, 56 L. Ed. 257, 260, 32 Sup. Ct. Rep. 140; *Missouri P. R. Co. v. Larrabee Flour Mills Co.*, 211 U. S. 612, 623, 53 L. Ed. 352, 361, 29 Sup. Ct. Rep. 214; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. Ed. 702, 19 Sup. Ct. Rep. 465; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. Ed. 853, 17 Sup. Ct. Rep. 418; *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453, 55 L. Ed. 290, 31 Sup. Ct. Rep. 275; *International & G. N. R. Co. v. Anderson County*, 246 U. S. 424, 62 L. Ed. 807, 38 Sup. Ct. Rep. 370. Nothing to the contrary was held in *Western U. Teleg. Co. v. Foster*, supra. There is a twofold distinction. The regulation there condemned was one that affected telegraph companies in a field already occupied by the statutes of the nation (Act to Regulate Commerce, as amended June 18, 1910), and it imposed a new duty instead of enforcing an old one (247 U. S. at page 114, 62 L. Ed. 1016, P. U. R. 1918D, 865, 38 Sup. Ct. Rep. 438).

"In thus holding, we do not forget that the state, in the exercise of its police power, must not introduce diversity and conflict in spheres where there is need of uniformity and harmony. That is the reason why, irrespective of any occupation of the field by congress, it may not fix the rates of interstate transportation. It may not do this, even though it confines its action to that part of the interstate journey within its own limits. The law in that respect has been undoubted since the decision in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. Ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. A statute of Illinois prescribed that there should be no greater charge for a short haul than for a long one. In condemning the statute the court emphasized the need of uniform regulation. If each state prescribed different rates for different portions of the trip the result would be chaos. Again, in the Covington Bridge Case (*Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. Ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087) the decision had a like basis. A bridge lay between two states. One state attempted to fix a charge. The court said that if one state could fix one charge the other could fix another, and again the result would be chaos. On the other hand, the question was left open whether the two states, in default of action by congress, might establish a joint tariff (154 U. S. at page 222). These cases are taken as typical of many others. The principle back of them has been often stated. 'As to those subjects which require a general system or uniformity of regulation the power of congress is exclusive.' *Minnesota Rate Cases (Simpson v. Shepard)*, supra, 230 U. S. at page 399, 57 L. Ed. 1541, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 740, Ann. Cas. 1916A, 18. As to 'other matters, admitting of diversity of treatment according to the special require-

ments of local conditions,' there is a reserved power in the states, subject, in its exercise, to the overriding power of the nation. 'Inaction of congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the states and requiring uniformity of regulation,' is not a denial, but a concession, of the power of the vicinage. *Mobile County v. Kimball*, 102 U. S. 691, 699, 26 L. Ed. 238, 240; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 703, 27 L. Ed. 584, 589, 2 Sup. Ct. Rep. 732. Familiar illustrations are regulations of the fees of pilots (*Cooley v. Port Wardens*, 12 How. 299, 319, 13 L. Ed. 996, 1004), charges for the use of wharves (*Parkersburg & O. River Transp. Co. v. Parkersburg*, *supra*; *Minnesota Rate Cases*, *supra*, 230 U. S. at page 405, 57 L. Ed. 1544, 48 L. R. A., n. s., 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18), and tolls for the use of natural waterways which have been artificially improved (*Sands v. Manistee River Improv. Co.*, 123 U. S. 288, 31 L. Ed. 149, 8 Sup. Ct. Rep. 113). *Dicta* may, indeed, be quoted where the court, in sustaining police regulations, has observed, as if by way of contrast, that they did not involve the regulation of rates. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. Ed. 688, 18 Sup. Ct. Rep. 289; *Western U. Teleg. Co. v. Commercial Mill Co.*, *supra*, 218 U. S. 418, 54 L. Ed. 1092, 36 L. R. A., n. s., 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815. But in every case the rates in view were rates of transportation. That is a field where regulation, if there is to be any, must be uniform. A central authority must reconcile the clashing action of localities. What is within the police power of one state is equally in such circumstances within the police power of its neighbor. One cannot freely exercise its will without affecting at the same time the like freedom of another. In the phrase of Hobbes, there is need of 'a common power to keep them in awe.'

"We deal here with a different situation. There is here no regulation of transportation. *Manufacturers Light & Heat Co. v. Ott*, (D. C.) 215 Fed. 940, 944. There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. *Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 408, 32 L. Ed. 979, 984, 9 Sup. Ct. Rep. 553; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252; *Shepard v. Milwaukee Gas Co.*, 6 Wis. 539, 70 Am. Dec. 479. The service is due to the state from which the privilege proceeds. Until congress shall intervene it is therefore the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but until

displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority for clashing regulations. The statute has a sphere of operation that is not national, but local. *Cooley v. Port Wardens*, supra. It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the nation as a whole, will readily discern them.

"The case comes, then, to this: We have a sale of a single commodity. We have a preëxisting duty to sell it at fair rates. We have a transaction on where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of congress cannot be interpreted as a declaration that public-service corporations, serving the needs of the locality, may charge anything they please. *Mobile County v. Kimball and Parkersburg & O. River Transp. Co. v. Parkersburg*, supra; *Covington Bridge Case*, supra, 154 U. S. 222, 38 L. Ed. 970, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087. The local regulation stands until congress occupies the field.

The supreme court of the United States, in *Pennsylvania Gas Company v. Public Service Commission*, supra, in affirming the decision of the court of appeals of New York said:

"The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the court of appeals of New York, and we agree with that court that until the subject matter is regulated by congressional action the exercise of authority conferred by the state upon the public-service commission is not violative of the commerce clause of the federal constitution."

It is contended that the sale of the gas to the local distributing companies ends the interstate character of the commerce involved. That, however, is not to say that the interstate commerce, if it ends at the city gates, is not subject to regulation by the state. The supreme court, in the Pennsylvania case, has expressly held that the state may regulate the sale of natural gas in interstate commerce where it is of a local nature. The sale of natural gas by the defendant to the distributing companies in no way differs from the sale by that company to cities, industries or large consumers of gas. In either case it is interstate commerce of a local nature which has not been regulated by congress, and the principles of law which

are applied to the interstate commerce at the burners' tips in the Pennsylvania case are equally applicable to the sale of gas measured by the flow meters to the distributing companies in Kansas. The business of selling such gas to the distributing companies is as much local in its character as is the sale of the gas to consumers in the various cities. The price of such gas may reasonably vary with the different local conditions, such as the distance from the producing wells, etc.

While it may, therefore, be conceded that the sale of natural gas transported from other states into Kansas and intermingled with gas produced from wells in Kansas is interstate commerce, it nevertheless is subject to regulation in the absence of any action on the subject by congress.

We are unable to distinguish any difference in the application of the principles of law announced in the Pennsylvania case applicable to sale in interstate commerce at the burners' tips from the principles of law which must necessarily be applied to the sale of the same character of commerce to distributing companies, industries and other large consumers. In the Cimarron case, *supra*, the state supreme court held that the sale of electric current to a city to be distributed among its inhabitants was subject to regulation. There is no difference in principle between that case and this case. If the Public Utilities Commission can regulate the sale of wholesale electric current to cities or distributing companies it can also regulate the wholesale rates of natural gas sold to such distributing companies. The fact that the sale of natural gas at the city gates is part of interstate commerce of a local character does not prevent the Public Utilities Commission from regulating the rates at which the gas is sold.

The state supreme court in the cases cited herein hold that: (1) The Kansas Natural Gas Company is a public utility subject to the regulation of the Public Utilities Commission; (2) that natural gas transported from one state to another is interstate commerce; (3) that such commerce is local in its nature; (4) it does not admit of one uniform system of regulation; (5) it is not that kind of interstate commerce which requires exclusive legislation by congress; (6) that until congress acts it is under the control of the state; (7) that "where the subject is peculiarly one of local concern and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals

because congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power"; (8) that "it may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulation of a reasonable character"; (9) that "such regulations are always subject to the exercise of authority by congress, enabling it to exert its superior power under the commerce clause of the constitution."

We respectfully submit that the gas pipe lines should not be permitted to occupy a twilight zone of nonregulation because congress refused to take jurisdiction of them as it did the oil pipe lines. This of itself was a legislative finding that the transportation and sale of gas for domestic use was of a local nature, and one which did not naturally fall within the powers of congress. We think this case fully demonstrates the correctness of this legislative finding. The supreme court of Kansas, in the Winfield case considered by this court at this session, has found that the connection of a number of local companies with this pipe-line company is sufficient to affect the interests and conditions surrounding each of the companies. For these reasons, the judgment of the supreme court of Kansas should be affirmed.

Respectfully submitted,

FRED S. JACKSON,

Attorney for Defendant in Error.





NOV 6 1922

WM. R. STANLEY

No. 642 133

In the Supreme Court of the United States

October Term, 1922.

THE KANSAS NATURAL GAS COMPANY,
Plaintiff in Error,

VS.

STATE OF KANSAS on the relation of A. E. Helm,
Attorney for the Public Utilities Commission
of the State of Kansas, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

H. O. CASTER and
ROBERT D. GARVER,
Attorneys and Counsel for Plaintiff in Error.



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Attorney for the Public Utilities Commission
of the State of Kansas, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR.

No. 642.

STATEMENT.

This is a proceeding in error to the Supreme Court of Kansas for deciding adversely to Plaintiff in Error the issues raised by the demurrer of the State to the return and answer of Plaintiff in Error to an alternative writ of mandamus issued by said Supreme Court.

Under date of April 1st, 1922, the Plaintiff in Error sent out a written notice to all distributing companies being supplied with gas by it as follows:

"You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch."

On April 25th, 1922, the State of Kansas, through its Public Utilities Commission filed this proceeding in the Supreme Court of Kansas, alleging that Plaintiff in Error was engaged in the business of supplying gas to the various distributing companies named in its petition and that it was, pursuant to the notice above quoted, attempting to charge and collect from said distributing companies a city gate rate of forty cents per M cubic feet, the same being an increase of five cents per M cubic feet over the rate previously charged, without submitting such increased rate to the Public Utilities Commission of the State of Kansas and without having secured the consent of such Commission thereto.

To the alternative writ of mandamus issued on the petition of the State this Plaintiff in Error filed its return and answer in which it alleged the character of the business being carried on by

it; that it was charging a rate without having submitted the same to the Public Utilities Commission and without having secured its approval thereto; and in which it asserted that it was engaged in interstate commerce of a national character not subject to direct regulation by said State. To this return the State of Kansas filed its demurrer which demurrer was sustained by the Supreme Court of Kansas and a peremptory writ of mandamus allowed. The facts alleged in the return are admitted by the demurrer and are briefly as follows:

Plaintiff in Error is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipeline running from the State of Oklahoma, across the State of Kansas and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipeline 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma and entered said pipeline in said State and 3,796,690,000 cubic feet of which was produced in the State of Kansas and entered said pipeline in that State; that the total amount of gas so transported, 5,164,121,000 cubic feet was delivered in the State of Kansas, and 5,558,959,000 cubic feet was delivered in the State of Missouri; that the gas obtained in Oklahoma and in Kansas is intermingled in said pipeline and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of

Kansas into the State of Missouri; that Plaintiff in Error does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies but sells gas to distributing companies at the respective city gates for an agreed price. That the figures above given for the year ending December 31st, 1921, represent an average year insofar as showing the relative proportion of gas delivered in Kansas and Missouri; but do not correctly represent the average relative receipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of gas was received from the Colony field in Anderson County, Kansas, which field at the present rate of decline will have practically no gas available for the use of said pipeline in supplying the demand for the winter of 1922 at which time practically all the gas supplied to Kansas and Missouri as shown by the 1921 figures above given will have to be purchased in and transported from the State of Oklahoma; that its business as above set out constitutes commerce among the States of a national character which is not subject to regulation by the Public Utilities Commission of the State of Kansas and that it has the legal right to charge the several distributing companies set out in Plaintiff's petition such reasonable and just rates for gas delivered to them as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority so to do; that the rate of forty cents per thousand cubic feet for gas

delivered at the city gates of the several distributing companies set out in Plaintiff's petition is a just and reasonable rate and is necessary to be charged in order to secure to said Kansas Natural Gas Company a reasonable return on the value of its property used and useful in connection with the service rendered and that a less rate would be unremunerative, non-compensatory and confiscatory. The petition of the State of Kansas appears at page 1 of the transcript of record and the return to the alternative writ of mandamus appears at page 12.

The legal question to be determined by this Court on the return of Plaintiff in Error to the alternative writ of mandamus, admitted by the demurrer of the State, is whether or not the Plaintiff in Error has the legal right without the consent of the Public Utilities Commission of the State of Kansas to establish such reasonable rates as may be necessary to earn a fair return on its property.

SPECIFICATION OF ERRORS.

First: The court erred in holding that the State of Kansas, through its Public Utilities Commission, has the power to regulate the sale of natural gas in said State by fixing the price which the Kansas Natural Gas Company might charge therefor, where the gas is produced in Oklahoma, transported through the pipelines into the State of Kansas and is sold to distributing companies that in turn sell the gas to the consumers thereof in a number of cities in said State, said Kansas Natural Gas Company holding no franchises from any cities in said State and not itself engaging in the sale or distribution of the gas transported by it, other than the sale to such distributing companies.

Second: The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was subject to direct regulation by the State of Kansas.

Third: The court erred in holding that the interstate commerce in which it found the Kansas Natural Gas Company to be engaged was not national in its nature, does not admit of one uniform system of regulation and is not that kind of interstate commerce which requires exclusive legislation by Congress. And in holding that un-

til Congress acts, such business is under the control and regulation of the State of Kansas.

Fourth: The court erred in holding that the several distributing companies to which the Kansas Natural Gas Company sells its gas are to be considered the consumers of the gas so sold, and that the Kansas Natural Gas Company is subject to the same regulation as it would be, if, under franchise granted by said respective cities, it was engaged in the distribution and sale of gas to the inhabitants of said cities, and the price which it may charge said distributing companies is subject to the same regulation as the price charged by distributing companies for the sale of gas to individual consumers at the burners' tip.

Fifth: The court erred in sustaining the demurrer of the State of Kansas to the return and answer of the Kansas Natural Gas Company to the alternative writ of mandamus herein.

Sixth: The court erred in allowing and issuing a peremptory writ of mandamus herein requiring the Kansas Natural Gas Company to re-establish and maintain a rate of thirty-five cents per thousand cubic feet for gas delivered by it to the distributing companies in the cities of said State until a different rate is fixed by order of the Public Utilities Commission of said State.

BRIEF OF ARGUMENT.

The six specifications of error will all be discussed together as they are all directed toward one proposition which is:

Proposition.

The business carried on by Kansas Natural Gas Company as set out in its return and answer to the alternative writ of mandamus is interstate commerce of a national character which cannot be directly regulated by the State.

In our discussion of the above proposition as a correct statement of the law, we will first state the applicable law as heretofore settled by the decisions of this court.

I.

The business of transporting gas by pipeline from one State into another is interstate commerce. *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. E. 577. *Pennsylvania Gas Company v. Public Service Commission*, 252 U. S., 23, 64 L. E. 434

"That the transportation of gas through pipelines from one State to another is interstate commerce may not be doubted." *Public Utilities Commission v. Landon*, *supra*.

II.

The States cannot directly regulate or burden interstate commerce. Minnesota rate cases, 230 U. S. 332. *Public Utilities Commission v. Landon*, *supra*. *Pennsylvania Gas Company v. Public Service Commission*, *supra*.

"The principle which determines this classification underlies the doctrine that the States cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."

Minnesota rate cases, *supra*.

In the Pennsylvania Gas Company case, *supra*, this court in applying the above rule to the transportation of gas by pipeline from one State to another, said,

"The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce."

III.

The States may pass laws indirectly affecting interstate commerce when needed to regulate or protect matters of local interest. Minnesota rate

cases, *supra*; *Pennsylvania Gas Company v. Public Service Commission*, *supra*.

The rule is thus stated in the Minnesota rate cases:

"But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected."

In the *Pennsylvania Gas Company* case the same principle was thus stated:

"In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."

It is unnecessary to burden the Court with any discussion of the proposition that the business carried on by Plaintiff in Error is interstate commerce or that interstate commerce cannot be directly regulated or burdened by the State. Both of these propositions are admitted by the State and are too well established to require more than the citation of the above cases. It is also admitted by Plaintiff in Error that the State can indirectly regulate interstate commerce in matters local in their nature. It appears, therefore, that

all the abstract legal principles involved are agreed upon by Plaintiff and Defendant in Error. The agreement of the parties as to the law vanishes only when the law is attempted to be applied to the undisputed facts. It is contended by the State that the establishment of the price for which Plaintiff in Error shall sell its product is local in its nature and is neither a direct regulation nor an unreasonable interference. The State recognizes the law as laid down by this court in the Landon case as follows:

"That the transportation of gas through pipelines from one State to another is interstate commerce may not be doubted; also it is clear that as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the State."

It admits that the Plaintiff in Error

"Might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State,"

but says the fixing of the price which it shall charge is not unreasonable. It justifies its position by the decision of this court in the Pennsylvania Gas Company case wherein it is said:

"In dealing with interstate commerce it is not, in some instances, regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when

needed to protect or regulate matters of local interest"

and

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States although Congress has not legislated upon the subject."

It says in affect that its regulation is indirect and that it concerns a matter of local service.

Our discussion, will, therefore, be confined to these two propositions.

Is the Attempted Regulation Indirect Only?

This court to our knowledge has never attempted to define direct or indirect regulation and in the nature of things no hard and fast rule can obtain, but each case must be determined upon its own facts.

Plaintiff in Error is engaged in the business of transporting gas for sale. It is difficult to conjecture any article of interstate commerce which is not being transported for sale or any person engaged in such commerce whose purpose is not to sell the article so transported. The sale "among the States" is the purpose of the commerce and the returns from the sale the incentive for engaging in it. Plaintiff in Error has no purpose in transporting gas other than to sell it. The sale

of gas is the business in which it is engaged. The transportation is incidental only. The pipeline is merely a means of delivery. If the pipeline in question was not owned by Plaintiff in Error and its business was transacted by delivering gas in Oklahoma to a common carrier for transportation to its several distributing company customers in Kansas, the situation would not be different in principle. If regulation of the price which Plaintiff in Error may charge for its product is not a direct regulation, what, may we ask, would constitute a direct regulation? What else is there connected with the business that remains if the sale is eliminated? Other than the sale, what is there upon which a direct regulation might attach? If this is indirect regulation, counsel for the State must suggest what might constitute a direct regulation, for we are unable to conceive it. The Kansas Natural Gas Company stands in no different position than any other company supplying a different kind of fuel to the public. Coal is as much used for fuel as gas and yet it would not be contended that the company transporting coal in interstate commerce could be compelled by a State to sell to one not agreeable to it or at a price not acceptable. Fuel oil shipped in tank cars is in as common use as gas and yet the State has not undertaken to establish its price. Gas is as much a fuel as either of the above and there is no apparent difference in principle unless it can be said that the mere fact that gas is transported in a pipeline (the only way it is possible to transport it) places it in a class by itself and gives it a

status it would not have if the transportation could be made in tanks.

If regulation of the price which Plaintiff in Error may charge for its product is subject to direct regulation, or if the attempted regulation is not direct but indirect only, then the decision in both the Landon and Pennsylvania Gas Company cases are wrong in principle and fallacious in their reasoning.

In the Landon case, *supra*, the business under consideration was the business of Kansas Natural Gas Company, this Plaintiff in Error, then in the hands of a receiver, and the facts were the same as in the case at bar with the exception that gas was supplied to the several local distributing companies under an arrangement whereby this company received for its gas a proportional part of the price collected by the distributing companies from the consumers. It was contended by the receivers that the gas continued in interstate commerce under this arrangement until it reached the burners' tips on the theory that the distributing companies acted as agents for the transportation company, and on this theory it was contended that the rates of the distributing companies were free from regulation by the states. This Court refused to accept the theory of agency and held that the interstate character of the gas was lost when it was delivered to and entered into the mains of the local company. In regard to this feature of the case the court said:

"The thing which the receivers actually did was to deliver supplies to local companies.

Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

As the orders complained of in the Landon case affected merely the rates to be charged by the distributing companies to their consumers and only indirectly affected the price to be received by the receivers, the court denied the relief sought.

"The challenged orders related directly to prices of gas at burners' tips, and only indirectly to the receivers' business. They were under no compulsion to accept unremunerative prices; even the original supply contracts had not been adopted and was subject to rejection."

"That the transportation of gas through pipelines from one state to another is interstate commerce may not be doubted; also it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the state."

If in the Landon case the Court had understood the law to be that the regulation of the price to be charged by the transportation company was permissible the above reasoning would clearly not have been employed and the Court would have so stated the rule instead of placing the case within an exception to the rule. At that time the arrange-

ment between the transportation company and the distributing companies was purely a voluntary one and not governed or attempted to be regulated by any order of the State Commission. The Court called attention to this by stating that the supply contracts were subject to rejection, and that the receivers were under no compulsion to accept unremunerative prices. The whole decision is based upon the fact that the Commission was undertaking to regulate the prices charged by the distributing companies and not the prices charged by the receivers, and that the business of the receivers was only indirectly affected. The situation in the case at bar is the reverse of the Landon case. Here there is no question of the rates to be charged locally by distributing companies and such rates are not affected except incidentally and in the same manner that the rate of any public utility may be affected by the price it has to pay for its materials and supplies. The question here is whether or not the business of transporting and selling gas in interstate commerce by a company operating under no franchise and undertaking no distribution or supply to consumers, is subject to direct regulation by the State. We believe the decision in the Landon case clearly supports our contention that the State has no such power. If this were not so it would have been entirely unnecessary in that case for the Court to decide where interstate movement ended; that the distributing companies were not agencies of the transporting company; or that the orders complained of only indirectly affected the price which the transporting company might

charge—that is, interstate commerce. All the court need have said was that the regulation of all gas charges was not direct and was permissible.

The facts in the Pennsylvania Gas Company case differ from those in the Landon case in that in the latter case the distributing companies received their gas from the transporting company, while in the Pennsylvania Gas Company case the company which transported the gas from without the state itself engaged in its distribution. In the announced principles there is no difference in the two cases and one goes no farther than the other. It was held in the Landon case that the matter of the rates to be charged by a distributing company was a matter of local interest which the state could regulate; that such rates only indirectly affected the transporting company, and that the latter could not complain of the orders made as a regulation of interstate commerce.

The Pennsylvania Gas Company case announces the same principle of law and merely enlarges the former statement by adding that it is immaterial whether the distributing company purchases its gas from a transportation company or is itself the transporting company. In other words, that the price charged consumers is a matter of local interest, only indirectly affecting interstate commerce, and can be regulated by the state whether the gas sold consumers is a part of an uninterrupted interstate movement or not. No other question was in that case. In its opinion, the court said:

“The thing which the State Commission has undertaken to regulate, while part of an inter-

state transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the state of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to local consumers, who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city. * * * While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress. * * *

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the state from making local regulations of a reasonable character."

The foregoing quotation shows clearly that the only regulation attempted, or which was involved in the Pennsylvania case, was a regulation of consumers' rates. In speaking of its decision in the Landon case in the course of the opinion in the Pennsylvania case, the court said: "The rates to be charged by the local companies had but an indirect effect upon interstate commerce, and, therefore, the matter was subject to local regulation."

In applying the law to the case before it, the court said in effect the same thing, as appears in the paragraph last above quoted. In neither case was there before the court any question other than the power of the state to regulate the rates to be charged to consumers by companies operating under franchises and engaged in a purely public service.

Both cases held that the fixing of consumers' rates at the burners' tips only indirectly affected the transportation, or interstate commerce end of the business, and the cases were ruled on this reasoning. Had the right existed to directly regulate interstate commerce the court would have so stated the law and these cases would have been governed by the rule and not by an exception to a rule.

The attempted regulation is a direct regulation of interstate commerce, never heretofore sanctioned by any decision of this Court.

**Is the Attempted Regulation One Permissible as
"Needed to Protect or Regulate Matters of
Local Interest"?**

We have heretofore stated that neither the Landon case nor Pennsylvania Gas Company case would have been reasoned as they were if the regulation of the price for which a gas company engaged in interstate commerce might sell its product constituted an indirect regulation and not a

direct one. We say also that they would not have been so reasoned if the regulation of such sale price was in the power of the states as a matter of local interest. The cases would have been decided by so stating the rule, and it would have been unnecessary in either case to have carefully drawn the line between the sale by the transporting company to the distributing company and the sale by the distributing company to its consumers. The reason for, and the purpose of, this distinction between the two classes of business would fall, ~~if~~ the rule of law is the same as to each.

Had the rule been the same the court would not have said in the Landon case, "The challenged orders related to price of gas at burners' tips and only indirectly to the receivers' business. They were under no compulsion to receive unremunerative prices, even the original supply contracts had not been adopted and were subject to rejection." Nor would it have been said in the Pennsylvania Gas Company case, "While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress." * * *

"It may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulations of a reasonable character."

The two cases above discussed are determinative of the propositions that rates to consumers are a

matter of local interest. They are also determinative of the proposition that rates charged by distributing companies to their consumers are so indirectly connected with or dependent upon the price charged such distributing companies for gas as to only indirectly affect interstate commerce and to give the transporting company no reason for objection on the ground that state regulation of the one unreasonably burdened the other. This should eliminate from the case at bar any contention on the part of the State that its right of control grows out of the fact that the price the transporting company may charge will be passed on by the distributing company to the consumer and thereby become a matter of local interest. The State has no more interest in the price charged the distributing companies than the transporting company has in the price allowed the distributing companies by the State. As stated in both of the above cases, these two rates are related and one affected by the other, but such relation is too indirect to be taken into consideration. Every artificial gas plant, every light plant, is dependent upon coal. The price of coal to each such plant is reflected in the rate it must charge its consumers. Yet in no such case has any regulation ever been thought of or attempted. Neither the Landon nor the Pennsylvania Gas Company case was decided by this Court upon any theory that a state could fix the price at which the transportation company might sell its product, but each carefully distinguished and accepted the case from a general rule applicable to

such sales, which Justice Hughes thus stated in the Minnesota rate cases:

"The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce."

We have heretofore stated that if the fixing of the price which Plaintiff in Error may charge for its product is an indirect regulation we are unable to conceive what a direct regulation would be. We now stated that if the business carried on by the Plaintiff in Error is local in its nature, we are unable to conceive what a business would be which is not local in its nature. The business of Plaintiff in Error does not involve merely the transportation of gas from a point outside the State of Kansas to a point within such state. Its business is much broader and more comprehensive. It includes the purchasing and transporting of gas in volumes sufficient to meet the requirements of the twenty-six distributing companies set out in the original petition of the State herein. In addition to the gas transported into and sold in Kansas, a greater amount is transported and sold in the State of Missouri. Assuming the principle contended for by the State, that is, that in the absence of Federal regulation a state may directly regulate the rates to be charged for gas sold in interstate commerce of a local nature, one is confronted with the inquiry, "What is interstate commerce of a local nature?" Is the Kansas Natural engaged in local interstate commerce? We do not know what may

be meant by interstate commerce of a local nature, but if the term is susceptible of definition it surely could not include transportation over parts of three states and the sale of gas to a large number of distributing companies located in different parts thereof. If this is interstate commerce of a local nature, then under what circumstances is interstate commerce not local? Justice Hughes in writing the opinion of this Court in the Minnesota rate cases stated the principles applicable to the regulation of interstate commerce in terms so clear, plain and concise as to evidence the intention to state the principles fully and leave nothing to be added thereto. It is significant that in this decision no reference is made to "interstate commerce of a local nature," or any attempt made to classify interstate commerce as local or otherwise. Nor is it asserted in that decision that with respect to interstate commerce the states under any circumstances have the power of direct legislation. All that was held in that decision or in any other decision of this Court to which our attention has been called is as stated in the Pennsylvania Gas Company case that the states may "pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest."

The Kansas Natural Gas Company is not holding itself out as either a common carrier or a public service corporation and is in fact neither. It is selling gas to such customers as it desires and recognizes no obligation to supply the public generally or to continue the supply to its present customers beyond such time as is agreeable to

it. And yet, if it is engaged in such a business as gives the State control and regulation, it can be required to sell to such parties as the State may direct, where the State may direct, as well as at such price as the State may direct. While no such power has yet been attempted by the State, the statute under which its commission is operating gives it the one power as clearly as the other.

That the business carried on by Plaintiff in Error is not a matter of local interest but is national in character and does not lend itself to regulation by the several states is apparent when the affect of conflicting rates in the three states through which its pipeline passes is considered. There can be no question that gas purchased in Oklahoma is more valuable when transported to the State of Kansas or to the State of Missouri and should demand a better price in those States, not only to compensate the transporting company for the expense of transportation but as a matter of fairness to the several communities involved. The State of Oklahoma might establish one rate for gas delivered to the gates of its cities, the State of Kansas another rate and the State of Missouri still another, the result of which might be that the Defendant would be compelled to sell its product in the State of Missouri for a less price than it received in the State of Oklahoma where the gas was produced.

As a further illustration of what might result from attempted local regulation we might suggest that the laws under which the Commissions of

the several states operate are entirely different and it may be developed that in some of the states the Commission may have no authority whatever over gas rates in certain cities and that the fixing of rates therein is a matter for the city itself. It is our understanding at this time that there has been submitted to this court a case in which the power of the Commission to fix rates for companies operating exclusively in one city is questioned (Winfield). If it should be determined that in this state or in Missouri or Oklahoma, the power to fix rates in certain cities belongs to the cities themselves, this defendant might be confronted with such a conflict of rates from one end of its line to the other, as would work a great injustice to it as well as an inequitable discrimination among the several companies served.

The matter of service is perhaps of more importance than the matter of rates. The public generally would rather pay a high price for good service, than a low price for poor service. Gas shortages in times of greatest demand have brought about more public discontent and condemnation than any matter of rates to be charged, and service in the nature of an adequate supply at all times is of the most vital interest to the public. The regulation of public utilities in respect to service is as clearly within the power of the state as the regulation of rates, and is as often exercised. In many instances rates are based on service and penalties and forfeiture are applied in the event pressure is not maintained, so that

it would become the duty of this defendant, not only as a matter of policy and good business, but as a matter of law, to give service. It operates a pipe line of a known capacity and through it can be transported just so much gas, and no more. If that entire capacity is now required to supply the demands of the present customers of the defendant in Oklahoma, Kansas and Missouri, what must result in the event the Commission of either of these states should order gas furnished to other cities, distributing companies or industries? If such an order should come from Oklahoma, the supply of gas for Kansas and Missouri would be decreased accordingly. A like order from Kansas would make it impossible to supply the demands of Missouri. Not only would defendant be unable to give service, but it would forfeit a large percentage of the price for the gas it had actually sold by reason of the failure of service.

The Decision of the Supreme Court of Kansas.

The Supreme Court of Kansas in its opinion herein has held that the business transacted by the Plaintiff in Error as shown by the facts alleged in its return to the alternative writ of mandamus is subject to regulation by the State and bases its opinion largely upon the authority of the Pennsylvania Gas Company case. The conclusion reached by Justice Marshall in his opinion would be correct if the premise upon which it is founded were true. In comparing the

case at bar with the Pennsylvania Gas Company case Justice Marshall correctly notes that the only difference in facts is that in the case at bar the Plaintiff in Error sells gas to distributing companies, where as in the Pennsylvania Gas Company case the transporting company and the distributing company were both owned by the Pennsylvania Gas Company. Justice Marshall then states, "so far as the Kansas Natural Gas Company is concerned the distributing companies in this State may be considered the consumers of the gas sold." If this is true, it naturally follows that one case cannot be distinguished from the other and the decision of the Kansas Supreme Court is correct on the authority of the Pennsylvania Gas Company case. We, however, most earnestly contend that the distributing companies to which the Kansas Natural sells its gas are not to be considered as consumers of the gas sold. As a matter of fact, they are not consumers at all, but are merchants who purchase the product of the Kansas Natural Gas Company for resale. The true facts were correctly stated by this court in the Landon case wherein it is said "the thing which the Receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account, and paid the Receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

The notice of April 1st, 1922 which was served by Plaintiff in Error upon the distributing companies supplied by it in both Kansas and Missouri, resulted in three separate proceedings being commenced to contest its right to change the existing city gate rate and establish a new rate without the consent of the Public Utilities Commission in Kansas and the Public Service Commission in Missouri. The Public Utilities Commission of Kansas instituted this proceeding before the Supreme Court of Kansas. The Public Service Commission of Missouri instituted a proceeding in the United States District Court for the Western Division of the Western District of Missouri, in which it sought to enjoin the collection of the increased charge, that proceeding being entitled "State of Missouri on the relation of Jesse W. Barrett, Attorney General of the State of Missouri and Public Service Commission of the State of Missouri, Complainant vs. Kansas Natural Gas Company, a corporation, Defendant, No. 361 in equity." The third proceeding was instituted by G. J. Swan, Receiver of the Consumers Light, Heat and Power Company in the case of Central Trust Company of New York vs. the Consumers Light, Heat and Power Company, case No. 74 N in equity in the District Court of the United States for the District of Kansas, First Division, in which proceeding the State of Kansas intervened, setting up the facts alleged in its original petition herein, and asked that the Kansas Natural Gas Company be enjoined from collecting the proposed rate until

the approval of the Pubic Utilities Commission of the State of Kansas had been secured. In each of these three cases the question was squarely presented as to the jurisdiction of the States of Kansas and Missouri through their respective Commissions over the business being carried on by Plaintiff in Error. The cases before the Federal Court in the Western Division of the Western District of Missouri and the District of Kansas, First Division, were both decided in favor of the Kansas Natural Gas Company, each of said Courts holding that the business being transacted by it was not subject to regulation in the manner attempted by the respective States. The opinion of the United States District Court for the District of Kansas, First Division, was written by Judge John C. Pollock and is reported in 282 Fed., page 680. The decision of the United States District Court for the Western Division of the Western District of Missouri was delivered by Judge Arba S. Van Valkenburgh, and is reported in 282 Fed., page 341. The opinions of these two distinguished jurists in themselves constitute a brief for Plaintiff in Error herein and the same are hereto appended in full.

It is respectfully submitted that the judgment of the Supreme Court of the State of Kansas should be reversed with direction to that Court to deny the relief herein sought by the State of Kansas.

H. O. CASTER and
ROBERT D. GARVER,

Attorneys and Counsel for Plaintiff in Error.

APPENDIX.

In the District Court of the United States for the
Western Division of the Western District
of Missouri.

State of Missouri, on the Relation of Jesse W.
Barrett, Attorney-General of the State of Mis-
souri, and Public Service Commission of the
State of Missouri, Complainants,

vs

In Equity No. 361

Kansas Natural Gas Company, a corporation, De-
fendant.

In Equity. Suit by State of Missouri on Re-
lation of Attorney General and Public Service
Commission against Kansas Natural Gas Com-
pany. The Kansas City Gas Company, intervener.
Decree for defendant.

Jesse W. Barrett, Attorney-General of Mis-
souri, and R. Perry Spencer, General Counsel,
and James D. Lindsay, Assistant General-Counsel
of the Public Service Commission, all of Jefferson
City, Missouri, for the complainant.

H. O. Caster and R. D. Garver, both of Bart-
lesville, Oklahoma, and Richard J. Higgins, of
Kansas City, Missouri, for the defendant.

J. W. Dana, of Kansas City, Missouri, for the
intervener, the Kansas City Gas Company.

Van Valkenburgh, District Judge (orally):
Complainant, the State of Missouri, on the
relation of the Attorney-General of the State,

and the Public Service Commission of the State, filed a bill of complaint against the Kansas Natural Gas Company praying a permanent injunction against said company, to restrain it from increasing the price of gas sold by it to local distributing companies in the state, to the extent of five cents per thousand cubic feet, over the rates heretofore in effect, without first procuring the consent and approval of the Public Service Commission. Such increase of five cents per thousand cubic feet, the Kansas Natural Gas Company has informed the distributing companies, would be effective after the so-called April Meter Readings of 1922. The Kansas Natural Gas Company also advised the distributing companies that unless they complied with the rates announced and fixed by them, they would discontinue supplying gas to the distributing companies. The Kansas City Gas Company, which purchases gas from the Kansas Natural and distributes such gas so purchased at Kansas City, filed its intervening petition herein and asked, among other things, the same relief as that prayed by complainant.

The Defendant filed answers to the bill of complaint and the intervening bill, in which answers it asserts that it is engaged in the transportation of gas from the State of Oklahoma into and through the State of Kansas and into the State of Missouri; that such gas is sold by it in Kansas and Missouri, and that, therefore, its business is interstate commerce, and as such, is free from the regulation herein sought to be imposed. The three parties, complainant, intervener and de-

fendant, have executed and filed an agreed statement of facts, which is supplemented by evidence of a documentary nature, introduced by complainant and intervener. The facts thus established in so far as they may be necessary to a decision of the points in controversy, are hereinafter sufficiently disclosed. Upon the record thus made, the cause is presented for final hearing upon the application for permanent injunction against the Kansas Natural Gas Company from raising its rate five cents per thousand cubic feet at the gates of the cities, on the ground that the company has submitted itself, either directly or impliedly to the jurisdiction of the Public Service Commission, and that it has no right to raise that rate without first applying to the Commission, and then only subject to its orders with a right to review the Commission's findings, on the ground that the same are confiscatory and unreasonable.

The whole question has been submitted to the court upon one proposition, *i. e.*, the power of the Commission respecting this application.

The cases chiefly relied upon are the Landon case and the so-called Pennsylvania case, in the 249 U. S., at page 236, and 252 U. S., at page 23. The Landon case concerned itself entirely with the question of whether the right existed in the receivers of the Kansas Natural Gas Company to enjoin the utilities commissions and the municipalities from interfering with a raise of rates by a local distributing company; that was the real issue in that case. The Supreme Court had occasion to advert to some other principles involved,

and the case becomes important, principally from that standpoint. The court said that the transportation and sale of gas through pipelines from one State to another is interstate commerce, and that as a part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, "free from unreasonable interference by the State;" they were under no compulsion to accept an unremunerative price.

It has been stated and shown with respect to those conditional contracts, that conditions have been so materially changed that it is at least a matter of doubt, if not conclusively established, that those contracts as such are no longer binding as to the terms imposed by them.

Some question is raised here as to what is meant by the expression "free from unreasonable interference by the State."

In the Pennsylvania Gas case, the court had to do with the gas company as a distributing agent. There, gas was distributed directly to the consumers in different cities and localities therein mentioned, by the pipeline company, and the court held that when that was the situation the company came under the regulating power of the State, because what was done was a local intrastate business, and not interstate commerce, to which reference had been made in the Landon case; and they had occasion to differentiate the Landon case from the Pennsylvania case, which was then before the court; and it is not without significance that in deciding a question which came clearly within the local power, control and regulation of the State, it

should have been thought necessary by the Supreme Court to point out the difference existing between the different classes of commerce, interstate as against intrastate.

The court says:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipelines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court."

So we are left with no doubt as to the fact that this conclusively establishes that the transportation of natural gas from one State to another is interstate commerce, and that far we have no difficulty in reaching a final conclusion.

The court further said:

"The general principle is well established, and often asserted, that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself. *
* * In varying forms, this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352."

Now, it is significant that the court places the application of this principle upon the same basis as in the case of railroad regulation and transportation; so that we may have some light thrown upon the question by referring to the principles applicable to such cases. The Minnesota Rate Cases, of course, very exhaustively clear up the entire subject, and it is unnecessary to go to any other decided cases, in order to learn what the principles involved are, and to learn where the line of demarcation falls.

After stating the limitations, it was said in the Minnesota Rate Cases (page 402):

“But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them.

Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our Constitutional system has thus been made possible."

Now, in the Pennsylvania Gas Case, 252 U. S., at page 30-31, the court said:

"The rates of gas companies transmitting gas in interstate commerce are not only not

regulated by Congress, but the Interstate Commerce Commission Act expressly withholds the subjects from Federal control.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in the city.

This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject."

Now, we shall have occasion, from the cases cited in the Pennsylvania case, to see to what extent it lies within the power of a State directly to affect, regulate or burden interstate commerce—and by "burden" is meant anything that imposes either a restrictive or an onerous load upon the commerce—so any taxation is a burden, although the states have the right to tax, still a direct tax on interstate commerce is not permitted, at all,

because it is a direct burden. It may not be a prohibitive or exclusive burden, but it is a burden, and to that extent it falls without the power of the State. It becomes important to consider the exact meaning of this phrase, in differentiating the cases which arise in which interstate commerce is to some extent involved—the cases where the right to burden or affect is denied, and those in which the power of the State is sustained because of local interest, and where Congress had not entered the field. In a case like this, if Congress undertook to regulate the rates for the transportation and sale of gas transported in interstate commerce, as an incident to that it would have a right, undoubtedly, to regulate the intrastate business which was so interwoven with the interstate commerce as to make it a part of it. That is shown by the Minnesota Rate Cases. It was said there that the States had always regulated rates in the States, where it was purely a matter of intrastate commerce, and, while the Government had exercised control over all interstate rates, that it had never entered the field or sought by any regulation or administrative policy to take away from the States the right to control commerce that was purely intrastate; but in the Minnesota Rate Cases, Justice Hughes said that clearly Congress had the right to do that if it signified its intention—it had the power to do it, and since then that principle has been fully recognized.

In the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, on page 13, this is said:

"To the same effect, we think, is the case of *Railroad Company v. Husen*, 95 U. S. 465, 469, in which it was said that 'Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit and regulate that which is interstate, than it can that which is with foreign nations.' The court, therefore, while conceding the right of the State to enact reasonable inspection laws to prevent the importation of diseased cattle, held the laws of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the Act, even though they were perfectly healthy and sound.

The court said that a State could not under the cover of exercising its police powers substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure."

I am quoting, because of certain principles that have been laid down, and because I prefer to state them in the language of the Supreme Court, and as indicating what is meant by the cited cases that are applicable to the case before us.

In *Brown v. Maryland*, 12 Wheat, 419, l. c. 423, the court said:

"If Maryland has a right to enact laws of this description, she has a right to regulate her own foreign commerce, although, by the constitution, it is exclusively vested in Congress. The imposition of import duties is often resorted to, not for the purpose of revenue, but to regulate commercial intercourse with foreign countries. Discriminating duties, protective duties, prohibitory duties, are so many commercial regulations. These may all be resorted to under the guise of license laws. If Maryland has a right to pass general license laws, she may pass partial ones; she may select particular commodities and burden their sale with a license duty; she may establish a tariff of discriminating duties for herself and affect, if not defeat, the commercial policy of the country."

In *Heyman v. Hays*, 236 U. S. 178, the court says:

"The right to engage in interstate commerce is not the gift of a state; it cannot be regulated or restrained by a state, nor can a state exclude from its limits a corporation engaged in such commerce."

And the court, in the same case, cited *West v. Kansas Natural Gas Company*, 221 U. S. 229, l. c. 260, wherein it was observed:

"At this late date, it is not necessary to cite cases to show that the right to engage in

interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce."

Now, the Minnesota Rate Cases again have some particular phrases in them that require special notice in this connection. I refer to Minnesota Rate Cases, Volume 230, page 252, in which it is said:

"Even without action by Congress, the commerce clause of the Constitution necessarily excludes the states from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by single authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the states of direct burdens and restraints."

The court, in the same case, further said, l. c. 396:

"If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of Federal regulation should be free. If the Acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the state in the absence of

Federal legislation would have the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted."

In the same opinion the court further said, l. c. 399:

"The grant in the Constitution of its own force—that is, without action by Congress—established the essential immunity of interstate commercial intercourse from direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, states may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting legislation.

The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce."

In the case of *Wabash v. Illinois*, 118 U. S. 557, l. c. 571, the Supreme Court holds that interstate commerce which is national in its character is

subject to regulation by Congress exclusively. The court, in its opinion, said:

"The line which separates the power of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved; but we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. * * * The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interest of others. Nay, more—it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe

one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. * * *

And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country the state within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

Those remarks are thought pertinent in the case at bar. This gas originates in Oklahoma, passes through Kansas and comes into Missouri; and, of course, if the principle contended for by complainant is indulged, there might be, could be, and probably would be such regulation in these various states as in a very prohibitive degree to burden, restrict and embarrass the commerce of this nation.

Now, having it clearly disclosed that this is interstate commerce—and from all that has been said here, and from reading back the reports and decisions upon which the conclusion was based that there can be no direct regulation or burden of strictly interstate commerce by the states—it would seem to be beyond question that the state, here, and its Public Service Commission, has no authority to regulate the rate to be charged for such commerce by the defendant company. Of course, it

is contended that the company has so far subjected itself, by bringing its product into the state, and by doing so through mains and certain instrumentalities that have been established and built for that purpose, that it has voluntarily submitted itself to the jurisdiction of the state, and that, notwithstanding the fact that this is interstate commerce, it is still subject to state regulation.

I cannot indulge the contention that by the contract—by the supply contract which was made between the Kansas City Gas Company and the Kansas Natural Gas Company—that the Kansas Natural Gas Company necessarily or impliedly became a party to the franchise, and, therefore, subject to the control of the state. It never has been my opinion that that was the effect of that contract. It was simply that the Kansas City Gas Company, when that franchise was granted, was required by the city to disclose the source of its supply, so that the city would be apprised where it could get the gas, and upon what terms it could get it; but there never has been any contractual relation between the Kansas Natural Gas Company and Kansas City, and there never has been anything involved in the franchise which imposes a necessary duty upon the Kansas Natural, of which the city could avail itself directly, but simply it was known that the gas was to be procured from the Kansas Natural and its predecessors, and, necessarily, the city recognized that the company had to have some way to make the connections, whereby that supply could be effective; and in the Pennsylvania case, by means of transportation through the state and

into the state, that feature was far more pronounced than in this case; yet there was no disposition by the Supreme Court in that case to recognize that for that reason the Gas Company had placed itself within the jurisdiction of the state authorities.

Now, it is very probable, of course, that this is a commodity that should, in some way, be regulated. As the Supreme Court has said, that is a matter confided to the Federal Congress. There is no doubt that these gas companies, furnishing gas throughout the United States, should have some body that may exercise control over them; but I am compelled to stand for what I believe the law has been disclosed to be, that the power of direct regulation of interstate commerce, whether Congress has entered the field or not, cannot be and is not lodged in the state. The fact that indirectly at the end of this interstate commerce local interests are affected is not decisive of the question. It is necessary that this company, itself, must have intervened in local affairs, as an instrumentality taking part in the distribution and operation of the affairs connected with that commerce, before local jurisdiction can be conferred.

This answers the question of "reasonableness" which has been raised; and we are compelled to come to the conclusion that under the rules announced by the court, any direct burden or regulation upon commerce which is distinctly interstate is unreasonable.

Judge Pollock, in the District of Kansas, in the case of *Central Trust Company v. Consumers*

Light, Heat and Power Company, in which was involved the right of the Kansas Natural Gas Company to increase its rates in Kansas without the consent of the Public Utilities Commission of that state, came to the same conclusion as that announced in this opinion.

I am compelled to conclude, therefore, that the injunction prayed must be denied.

In the District Court of the United States for the
District of Kansas, First Division.

Central Trust Company of New York,
Complainant,

vs.

No. 75 N Equity.

Consumers Light, Heat and Power Com-
pany, Defendant,

The State of Kansas on Relation A. E.
Helm, Attorney for the Public Utilities
Commission for the State of Kansas,
Intervener.

MEMORANDA OF DECISION ON QUESTION OF LAW.

The single question now presented to the court for decision in this suit is this, namely: Is the business done by the Kansas Natural Gas Company (hereinafter called the "Natural Company"), a Delaware corporation, engaged in the business of producing and buying natural gas, mostly in the state of Oklahoma, also in this state, and transporting the same through pipe lines in this state and through this state into the state of Missouri and delivering the same to distributing companies to be delivered by said companies to their customers, in its nature such business as is under the control and subject to the regulation of the Public Utilities Commission of the State of Kansas in the matter of rates or price per thousand cubic feet which may be charged by the Natural Company for the gas so transported, sold and

furnished the distributing companies at the intake of said distributing companies' lines at the gates of the cities?

This question arises and is now presented for determination in the following manner:

One G. J. Swan is the receiver, duly appointed, in the above entitled and numbered suit in this court, over the property and assets of defendant, the Consumers Light, Heat & Power Company, a corporation, created for the purpose of furnishing light, heat and power to the city of Topeka and its inhabitants in this state and the adjoining town of Oakland. Said receiver was through the gas system of defendant Light, Heat & Power Company engaged in the business of so furnishing gas at the time this litigation arose. The only source of supply of natural gas which said receiver has or can procure is from the Natural Company. The rate fixed and price charged by the Natural Company prior to the first day of April this present year for gas furnished and delivered to said receiver at the city gate was the sum of thirty-five cents per thousand cubic feet. However, on April 1st said receiver was by the Natural Company notified, as follows:

"Kansas Natural Gas Company.
Bartlesville, Oklahoma,
April 1, 1922.

Consumers Light, Heat & Power Co.,
Topeka, Kansas.

Gentlemen:

You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thou-

sand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.40 pounds per square inch.

Very truly yours,

KANSAS NATURAL GAS CO.,
By H. L. MONTGOMERY."

This same proposed increase in rates from thirty-five to forty cents per thousand cubic feet was made as to all cities and towns of this state without presentation of the right to do so to the Public Utilities Commission of this state, or receiving any authority from that source. Thereupon, the receiver of defendant Consumers Light, Heat & Power Company filed in this suit his complaint praying an injunction against the Natural Company restraining said company from charging the proposed rate of forty cents per thousand cubic feet on the ground said rate was confiscatory in view of the only rate it is by the Public Utilities Commission allowed to charge its customers.

Thereupon, a restraining order was granted the receiver, and the Public Utilities Commission, through its solicitor, in the name of the state, intervened herein, praying an injunction against the Natural Company restraining it from charging or collecting from any distributing company located in this state said increase in price of gas from thirty-five to forty cents a thousand cubic feet,

on the ground such proposed increase or charge for gas is unlawful and void because not authorized by the Public Utilities Commission of this state.

Thus is raised the issue of the power, jurisdiction and control of the Public Utilities Commission of this state over the business done by the Natural Company within this state.

Coming now to the consideration of this question, it may be said: The Natural Company owns and exercises no franchise rights in this state acquired from the state or any of its municipal bodies. It is a foreign corporation owning a pipeline system and is producing or purchasing gas in Oklahoma, this state, and transporting it from Oklahoma into and through this state into the state of Missouri, and delivering the same to some forty odd local gas companies holding franchises from the several cities in which they are located for the distribution and sale of natural gas therein. In the transaction of its business the Natural Company is engaged solely and alone in interstate commerce business within this state and does no local business whatever. This is conceded. The local companies to which the Natural Company sells its gas do a purely local business, hence, unquestionably are subject to the jurisdiction and control of the Public Utilities Commission of this state so far as located within this state. The question, however, is as to that business which is transacted by the Natural Company. This question, I find, has been presented to and received consideration from the Supreme Court in

the case of *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein Mr. Justice McReynolds, delivering the opinion for the court, said, in speaking of the business conducted by the Natural Company, as follows:

"The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing companies—was interstate commerce of a national character; that the commissions' actions interfered with establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law; that the original supply contracts were not binding upon the receivers. And it accordingly enjoined the commissions, their members, the attorneys general of both states, the various municipalities and the distributing companies from interfering with establishment of such reasonable and compensatory rates as the court might approve.

* * * * *

That the transportation of gas through pipe lines from one state to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the state. *American Express Co. v. Iowa*, 196 U. S. 133; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217.

* * * * *

Interstate commerce is a practical conception and what falls within it must be deter-

mined upon consideration of established facts and known commercial methods. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *The Pipe Line Cases*, 234 U. S. 548, 560. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

The business then being conducted by the receiver of the Natural Company differed from that now being conducted by the Natural Company in the fact that the gas transported by the Natural Company in that case was turned over to and distributed by the local gas companies under divisional orders of proceeds, whereas, in the present case the gas is sold outright and delivered to the distributing companies at the city gates. This fact more strongly disassociates the Natural Company from any local business whatever.

The case of *Penna. Gas. Co. v. Pub. Service Comm.*, 252 U. S. 23, is much relied upon by those insisting upon control of the business by the Public Utilities Commission. That was a case in which the Pennsylvania Company was engaged in both the interstate business of transporting natural gas from Pennsylvania into the State of New York for sale, and, also, under certain franchise rights granted to it by the City of Jamestown, New York, was distributing and delivering the gas to its customers at the burners' tips in the city.

Mr. Justice Day, delivering the opinion of the court, and distinguishing that case from the Landon case, said:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipelines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105.

This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation."

Now the contention of those here seeking to have the business of the Natural Company controlled by the Public Utilities Commission of the

State under State laws, is this: As the Federal Government has not attempted to exercise that exclusive control over the interstate business of the Natural Company which the commerce clause of the Federal Constitution confers upon it, therefore the State, through its Public Utilities Commission, may exercise that control so conferred on the Government under the commerce clause until the Federal Government takes over such control. However, it is quite well settled by authority although the business transacted be in its essential nature interstate, yet, so long as the General Government has not exercised its power conferred to regulate such commerce, the State may in incidental ways and manners impress restrictions upon interstate commerce. This is no place more aptly stated than by Mr. Justice Day in distinguishing the Landon case from the Pennsylvania Gas case then at bar, in which it is said, as follows:

"The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws in-

directly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation," etc.

However, the control which the Public Utilities Commission of the State here asserts over the business done by the Natural Company within this State is in no sense, manner or way incidental in its nature under the law creating the Commission, but is full, absolute and complete regulation and control over the interstate business of the Natural Company, precisely the same in its nature as it holds and exercises over the business of the local distributing companies, even to the extent of establishing the prices to be charged for what it transports into the State in interstate commerce and here sells at wholesale prices.

It has often declared no more complete control can be exercised over interstate business. See *Heyman v. Hayes*, 236 U. S. 178; *The Pipe Line Cases*, 234 U. S. 548; *Brown v. Maryland*, 12 Wheaton 419; *American Express Co. v. Iowa*;

Minnesota v. Barber, 136 U. S. 313; *Schollenberger v. Pennsylvania*, 171 U. S. 1, and many other cases.

From all of which, I am persuaded beyond doubt, so long as we have the guaranty of protection afforded and intended to be afforded by the framers of our National Constitution against the complete regulation and control of purely interstate commerce under the commerce clause of the Constitution, such regulation as is here sought by the State through its Public Utilities Commissions over the purely interstate business of the Natural Company cannot and should not be permitted.

It follows, the power and control attempted to be exercised by the State through its Public Utilities Commission over the interstate business of the Natural Company must be denied, and is denied.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923

No. 187

THE STATE OF KANSAS ON THE RELATION OF FRED S.
JACKSON, ATTORNEY FOR THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF KANSAS, ETC., AP-
PELLANT,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK, KANSAS
NATURAL GAS COMPANY, AND CONSUMERS LIGHT,
HEAT & POWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

FILED OCTOBER 19, 1923.

(29,302)



(29.202)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 652.

THE STATE OF KANSAS ON THE RELATION OF FRED S.
JACKSON, ATTORNEY FOR THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF KANSAS, ETC., AP-
PELLANT,

vs.

THE CENTRAL TRUST COMPANY OF NEW YORK, KANSAS
NATURAL GAS COMPANY, AND CONSUMERS LIGHT,
HEAT & POWER COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF KANSAS.

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1
IN THE
District Court of the United States for the District of Kansas,
First Division.

In Equity. No. 75-N.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,

vs.

CONSUMERS LIGHT, HEAT & POWER COMPANY, Defendant.

Citation on Appeal and Service.

[Filed Oct. 3, 1922.]

UNITED STATES OF AMERICA, ss:

To the Central Trust Company of New York and the Kansas Natural Gas Company and the Consumers Light, Heat & Power Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 19th day of October A. D. 1922, pursuant to an order allowing an appeal filed and entered in the clerk's office of the district court of the United States for the district of Kansas, First Division, from a final decree signed, filed and entered on the 16th day of June, 1922, in that certain suit, being in equity No. 75-N, wherein the Central Trust Company of New York is complainant and you are defendants and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable John C. Pollock, United States District Judge for the District of Kansas, First Division, this 19th day of Sept. 1922, and of the Independence of the United States the 146th. John C. Pollock, U. S. District Judge for the District of Kansas, First Division.

2 We hereby acknowledge service of the within citation, this 21st day of September, 1922. Thomas F. Doran, Attorney for G. J. Swan, Receiver of The Consumers Light, Heat and Power Co. Blair & Lillard, Attorneys for Central Trust Co. H. O. Caster, Robt. D. Garver, Attorney- for Kansas Natural Gas Co.

2½ [File endorsement omitted.]

3 In the District Court of the United States for the District of
Kansas, First Division.

[Title omitted.]

Petition.

[Filed Apr. 19, 1922.]

Comes now G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, duly appointed by and acting under authority of this Court, and respectfully shows:

1. That the Consumers Light, Heat and Power Company is now, and for many years last past has been, through a Receiver duly appointed by and acting under the direction and authority of this Court, engaged in the business of purchasing, distributing and selling natural gas in the cities of Topeka and Oakland, Kansas.

2. That all of the natural gas sold and distributed in the cities of Topeka and Oakland is purchased from The Kansas Natural Gas Company, which is your petitioner's only source of supply.

3. That your petitioner has been and is now paying to The Kansas Natural Gas Company 35¢ per thousand cubic feet for all gas delivered to your petitioner at the city gates of the city of Topeka, Kansas, which city gate rate has been approved as a proper operating expense by the order of the Court of Industrial Relations (now the Public Utilities Commission) of August 18, 1920.

4. That your petitioner is now, and has been since January 1, 1921, charging consumers of natural gas in the cities of Topeka and Oakland, 80¢ per thousand cubic feet of gas consumed, plus a customer's charge of 75¢ per meter per month.

5. Your petitioner further shows, that the rate now being charged was installed by L. G. Treleven, predecessor of this petitioner as receiver, after the rate fixed by the Court of Industrial Relations of the State of Kansas (now the Public Utilities Commission) in its order of August 18, 1920 (to-wit: 80¢ per thousand cubic feet) had been enjoined by this court as confiscatory, Judge Wilbur F. Booth sitting.

6. That after the installation of the present rate by the then receiver of this court, the Public Utilities Commission of the State of Kansas (which succeeded the Court of Industrial Relations) on its own initiative instituted a proceeding to investigate the reasonableness of the present rate (80¢ per thousand cubic feet of gas consumed, plus a monthly customer charge of 75¢).

In this proceeding due notice was given to all parties concerned and hearings had before the Public Utilities Commission which resulted in an order of the Public Utilities Commission of July 1, 1921, holding that:

"The rate of 80 cents per thousand cubic feet of gas furnished its consumers in said cities (Topeka and Oakland) based on an annual

leakage of 200,000 cubic feet per mile of 3 inch equivalent, is a fair and compensatory rate for the service rendered by said company."

In addition to the 80¢ rate thus fixed by the order of the Public Utilities Commission of July 1, 1921, that order provided that a reasonable sum for carrying on a campaign to reduce the leakage during the next twelve months was forty-eight thousand dollars, and then recited:

"It is by the Commission further ordered that said Consumers Light, Heat and Power Company be and it is authorized to collect a service or customers' charge from each of its customers in the sum of 35 cents per month; provided, however, that said service or customers' charge shall be placed in and accounted for as a separate item of account, and shall be used by said Consumers Light, Heat and Power Company through its receiver in his campaign to reduce the leakage of its distributing system to the fixed standard of 200,000 cubic feet per mile of 3 inch equivalent, and said fund shall be used for no other purpose; and provided, further, that the period for which such service or customers' charge may be collected is limited by this order to 12 months from the date hereof * * *"

7. That within thirty days after the entry of said order of the Public Utilities Commission, your petitioner, G. J. Swan, filed suit in this court to enjoin said order on the ground that the same is unremunerative, wasteful and confiscatory of the property in the hands of your receiver; that a temporary restraining order was issued 5 by this Court, Judge John H. Cottrell sitting; that thereafter, by stipulation of the parties, this suit was tried by this Court, Judge Wilbur F. Booth sitting; that printed briefs have been submitted to Judge Booth by the parties to said action; that the same is now pending awaiting the decision and decree of Judge Booth, who has advised the parties thereto that on account of other engagements said decision cannot be handed down until the latter part of May or the first part of June, 1922.

8. That on the first day of April, 1922, your petitioner, G. J. Swan, received written notice from The Kansas Natural Gas Company, that from and after the April 1922 meter reading its price for gas delivered to your petitioner at the city gates of the City of Topeka would be increased from 35¢ to 40¢ per thousand cubic feet. A true and correct copy of said notice is as follows:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

"Consumers Light, Heat & Power Co., Topeka, Kansas.

"GENTLEMEN: You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per

square inch. Very truly yours, Kansas Natural Gas Co. By H. L. Montgomery."

9. Your petitioner further shows that he is not advised, and has no means of ascertaining, whether said increase of rate to The Kansas Natural Gas Company established by said notice, is necessary to yield to The Kansas Natural Gas Company a just and reasonable return on its investment used and useful in the service of your petitioner; but your petitioner believes and therefore alleges the fact to be, that said increased rate is excessive and unreasonable.

10. That this petition is filed in this case for the purpose of protecting the property now in the possession of this Court through its Receiver, and of enforcing the jurisdiction of this Court in the administration of the property of The Consumers Light, Heat and Power Company now in the hands of your petitioner as Receiver of this Court; and for the purpose of submitting to this Court the question whether the increased rate demanded by The Kansas Natural Gas Company is a just and reasonable rate to be paid by this Receiver for natural gas, and for the purpose of obtaining the decree and direction of this Court whether the same shall be paid.

11. That the matter and amount in controversy in this cause exceeds the sum of three thousand dollars, exclusive of interest and costs; and that the cause of action herein stated arises under the Constitution and Laws of the United States.

12. That this petition is filed against The Kansas Natural Gas Company for the purpose of restraining and enjoining said company from requiring this plaintiff to observe the increased rate established by said The Kansas Natural Gas Company until said Kansas Natural Gas Company shall have shown to this Court that said charge or rate is just and reasonable, and until the same has been approved by this Court as a proper operating expense to be paid by this Receiver; and your petitioner shows that the business of The Kansas Natural Gas Company, in the transportation and sale of natural gas has been declared by the Supreme Court of the United States to be interstate commerce, and therefore is subject to the sole and exclusive jurisdiction of the federal courts, and that this court is the only court, tribunal or body to which your petitioner can resort for relief, as the Public Utilities Commission of the State of Kansas has no jurisdiction over the rates fixed and established by The Kansas Natural Gas Company; that said petitioner has no adequate remedy at law and that for this reason this action is brought; and your petitioner shows that if compelled to pay said added charge or rate the same will make the business of your petitioner in the sale and distribution of natural gas in the cities of Topeka and Oakland, unremunerative, non-compensatory and confiscatory under the rates now being charged by your petitioner, and under the rates established for your petitioner by the Public Utilities Commission of the State of Kansas in its order of July 1, 1921, the reasonableness of which rate is now being contested in this court, Judge Wilbur F. Booth, sitting.

That if said rate established by The Kansas Natural Gas Company

in said notice is made effective, under the present rates, or under the rates fixed by the Commission in its order of July 1, 1921, it will amount to the taking of the property in the possession and control of this petitioner without compensation, and without due process of law, in violation of the rights of your petitioner and of The Consumers Light, Heat and Power Company under the provisions of the first section of the 14th Amendment of the Constitution of the United States, which provides that:

"No state shall deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And in violation of the provisions of the Fifth Amendment of the Constitution of the United States which provides that:

"No person shall * * * be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."

13. Your petitioner further shows that until it shall be determined by this court whether your petitioner shall pay the increased rate demanded by The Kansas Natural Gas Company, and until it shall be determined by Judge Booth in the case now pending before him, whether your petitioner shall collect the present rate charged consumers, or the consumers' rate fixed by The Public Utilities Commission of Kansas in its order of July 1, 1921, there is no basis on which your petitioner can make application to The Public Utilities Commission of the State of Kansas, or to any other tribunal than this Court, for an order protecting the property in the hands of this Receiver pending the determination of this cause and of the cause new under consideration by Judge Booth.

14. That because of the impossibility of forecasting the result of this suit and of the action before Judge Booth, it is necessary that this Court, acting in equity, by its administrative order fix such increased rate to be charged consumers in the cities of Topeka and Oakland as shall be shown to this Court to be necessary to yield a reasonable return on the property in the hands of this Receiver, used and useful in the distribution of natural gas to consumers, in the event that said suits or either of them shall be determined adversely to this petitioner, to be effective until said suits are finally determined, and until such time as shall be necessary thereafter to enable this petitioner to make application to The Public Utilities Commission of the State of Kansas for a permanent and remunerative rate to your petitioner for natural gas sold to consumers in the cities of Topeka and Oakland, and until an order shall be entered by The Public Utilities Commission of the State of Kansas establishing such permanent and remunerative rate.

15. Your petitioner further shows that for the purposes aforesaid it is necessary that this Court, by its administrative order, authorize this petitioner to increase the present consumers' rate from 80¢ per thousand cubic feet of gas consumed, plus a 75¢ monthly customer charge, to 90¢ per thousand cubic feet of gas consumed, plus a 75¢ monthly customer charge, or such other form of rate as shall yield an equal return; and that said increase allowed by this Court in

its said administrative order should be collected by your petitioner, and under order of this court impounded in a responsible bank designated by this court, until it shall be determined whether said fund shall be paid to your petitioner to meet the added cost of gas, if finally determined to be reasonable, or returned to the consumer, if found to be unreasonable.

Wherefore, your petitioner prays:

1. That subpoena issue out of this Honorable Court, directed to The Kansas Natural Gas Company as defendant herein, requiring and commanding it to appear in this cause on a day certain and answer the several allegations of this petition, and requiring and commanding that said defendant show by competent evidence whether the increased rate demanded of your petitioner by it in its notice dated April 1, 1922, is necessary, just and reasonable.

2. That a temporary restraining order be issued herein, restraining and enjoining the defendant, The Kansas Natural Gas Company, from collecting, or attempting to collect, from this petitioner the increased rate named in its notice dated April 1, 1922, until it shall be determined by this Court whether the increased rate demanded by said defendant is just and reasonable, and that if it shall be determined by this Court that the increased rate demanded by said defendant is unjust and unreasonable, your petitioner prays that the temporary injunction herein granted shall be made perpetual.

3. Your petitioner further prays that pending the determination of all questions herein presented in the manner alleged, this Honorable Court by its administrative order direct this petitioner, as Receiver of The Consumers Light, Heat and Power Company, to demand and collect from consumers of natural gas in the cities of Topeka and Oakland, 90¢ per thousand cubic feet for all gas sold and consumed by them, plus a monthly customer charge of 75¢ or such other form of rate as shall yield an equal return; and that all funds derived from the increase allowed by the administrative order of this Court be by this petitioner impounded in such bank as shall be designated by order of this Court, to be held as a trust fund and paid to this petitioner or returned to consumers as equity shall demand, on the final determination of this cause and the cause now pending before Judge Booth, and until thereafter, on application of this petitioner, a just and remunerative permanent rate shall be established to said consumers by The Public Utilities Commission of the State of Kansas.

10 4. Your petitioner further prays that the defendant, The Kansas Natural Gas Company, its officers, attorneys and agents, be restrained and enjoined from commencing, instituting or prosecuting in any other court or tribunal any suit or proceeding to litigate any of the matters herein alleged and complained of, arising or growing out of any of the transactions or matters herein alleged, until the final determination of this suit.

5. Plaintiff prays for such other and further relief in the premises as to this Honorable Court may seem equitable and just. G. J. Swan, Receiver of The Consumers Light, Heat and Power Company. By Thomas F. Doran, His Attorney.

Temporary Restraining Order.

7

STATE OF KANSAS,
Shawnee County, ss:

G. J. Swan, being duly sworn, upon oath states, that he is the duly appointed and acting receiver of The Consumers Light, Heat and Power Company of Topeka, Kansas; that he is plaintiff in the above entitled action; that he has read the above and foregoing petition and knows the contents thereof; that he is familiar with the matters and things therein set out, and that the statements and averments therein contained are true. G. J. Swan.

Subscribed and sworn to before me this 19th day of April, A. D. 1922. Louie M. Bagley, Notary Public. (Seal.) My commission expires Nov. 26, 1924.

[File endorsement omitted.]

11 In United States District Court.

Temporary Restraining Order.

[Filed Apr. 19, 1922.]

Now, on this 19th day of April, A. D. 1922, the above entitled cause came regularly on for hearing on the duly verified petition of G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, filed herein, and the relief demanded in said petition; and the Court, having heard the statements of counsel, and having carefully examined said verified petition, and being fully advised in the premises, finds:

1. That a subpoena should issue out of this court, directed to The Kansas Natural Gas Company as defendant herein, requiring and commanding it to appear in this cause on a day certain and answer the several allegations of plaintiff's petition herein, and requiring and commanding said defendant to show by competent evidence whether the increased rate demanded of plaintiff herein, G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, in its notice of April first, 1922, is a necessary, just and reasonable charge to be made and collected.

2. That a temporary restraining order should be issued herein, restraining and enjoining the defendant, The Kansas Natural Gas Company, from collecting or attempting to collect the increased rate named in its notice to the plaintiff of April 1, 1922, until it shall be determined by this Court, whether the increased rate demanded by said defendant is a just and reasonable charge to be collected, and a just and reasonable price to be paid by the plaintiff for gas received from The Kansas Natural Gas Company.

3. That this cause be set down for hearing of evidence on a day certain which will enable this court to determine whether the plaintiff herein, G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, should be authorized and directed by this Court to

increase the present consumers' rate in the cities of Topeka and Oakland, and if so to determine what the amount of such increase shall be; and whether the funds arising from said increase, if allowed, should be impounded as a trust fund to be paid to the petitioner if

the rate herein demanded by The Kansas Natural Gas Company shall be found to be just and reasonable, or shall be returned to the consumers of gas if said increased city gate rate shall be determined by this Court to be unjust and unreasonable.

4. That The Kansas Natural Gas Company, its officers, attorneys and agents, should be restrained from commencing, instituting or prosecuting in any other court or tribunal any suit or proceedings to litigate any of the matters herein alleged and complained of, arising or growing out of any of the transactions or matters herein alleged, until the final determination of this suit.

Wherefore, it is considered and ordered by the court:

1. That the Clerk of this Court issue a subpoena herein, directed to The Kansas Natural Gas Company as defendant, commanding it to appear and answer in this cause, to make due showing whether the increased rate for gas fixed by its said notice of April first, 1922, is a necessary, just and reasonable charge to be paid by the plaintiff herein.

2. That the defendant, The Kansas Natural Gas Company, its agents, officers and attorneys, are temporarily restrained and enjoined from collecting or attempting to collect from the petitioner herein the increased rate named in the notice of The Kansas Natural Gas Company to the plaintiff, dated April 1, 1922, until the further order of this court.

3. That this case is set down for hearing of evidence, on application for a temporary injunction and on the 18 day of May, 1922, to enable this Court to determine whether its administrative order should issue herein, directing the petitioner herein, G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, to collect an increased rate from the consumers of gas in the cities of Topeka and Oakland to cover the added cost of such gas, if it shall be finally determined that the increase demanded by The Kansas Natural Gas Company in its notice of April 1, 1922, is a just and reasonable charge, and to determine whether, if such administrative order is issued, the funds derived from the increased rate to consumers authorized thereby shall be impounded as a trust fund to be paid to the

petitioner if said increased rate to The Kansas Natural Gas Company is determined to be a just and reasonable charge, or returned to consumers if said increased rate is finally by this Court determined and held to be an unjust and unreasonable charge, and until a just and remunerative permanent rate shall be established for consumers in the cities of Topeka and Oakland by The Public Utilities Commission of the State of Kansas on timely and proper application therefor.

4. That the defendant, The Kansas Natural Gas Company, its officers, attorneys and agents, are hereby restrained and enjoined from commencing, instituting or prosecuting in any other court or

tribunal any suit or proceedings to litigate any of the matters involved in this suit, or arising or growing out of the matters in the petition herein alleged, until the final determination of this suit.

5. The Clerk shall make and cause to be served upon the defendant, The Kansas Natural Gas Company, a duly certified copy of this order. John C. Pollock, Judge.

[File endorsement omitted.]

In United States District Court.

Order Granting Permission to Public Utilities Commission of Kansas to File Intervening Petition.

[Filed May 5, 1922.]

Upon motion of the State of Kansas, on the relation of A. E. Helm, Attorney for the Public Utilities Commission for the State of Kansas, said petitioner is hereby authorized and granted leave to file an intervening petition on its own behalf in this cause within five days from the date hereof. Dated 5th day of May, 1922. John C. Pollock, Judge.

[File endorsement omitted.]

14 In United States District Court.

Petition of Intervention of the State of Kansas.

[Filed May 6, 1922.]

Comes now the State of Kansas, on the relation of A. E. Helm, Attorney for the Public Utilities Commission for the State of Kansas, and by leave of court files its petition of intervention herein and alleges:

I.

That Clyde M. Reed, H. A. Russell and Jesse W. Greenleaf are the duly appointed, qualified and acting members of the Public Utilities Commission of the State of Kansas, and as such constitute the Public Utilities Commission of the State of Kansas.

II.

That A. E. Helm is the duly appointed, qualified and acting attorney for the Public Utilities Commission of the State of Kansas.

III.

That on the 25th day of April, 1922, and prior to the filing of this petition, the said Public Utilities Commission of the State

of Kansas entered an order directing that said A. E. Helm begin and prosecute an action in the Supreme Court of the State of Kansas against the above named defendant, for the purpose of procuring an order from said court directing the said defendant to reinstate and maintain in the future the rate of 35 cents per thousand cubic feet of natural gas furnished by the defendant to the distributing companies at the city gates of the cities obtaining their supply of natural gas from pipe lines of the defendant in the State of Kansas, until the defendant has obtained the consent of the Public Utilities Commission for the State of Kansas to change said rate.

IV.

That the said Kansas Natural Gas Company is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Kansas under the laws of the State of Kansas.

15

V.

That the Atchison Railway Light & Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the City of Atchison, Kansas, and its inhabitants.

VI.

That the American Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Altamont, Galena, Oswego, Columbus, Cherokee and Scammon, Kansas, and the inhabitants thereof.

VII.

That the Baldwin Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the City of Baldwin, Kansas, and its inhabitants.

VIII.

That the Coffeyville Gas & Fuel Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Coffeyville and Liberty, Kansas, and the inhabitants thereof.

IX.

That the Anderson County Light & Heat Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Colony, and Welda, Kansas, and the inhabitants thereof.

X.

That the Tri-City Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Cherryvale, Kansas, and its inhabitants.

16

XI.

That the Edgerton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Edgerton, Kansas, and its inhabitants.

XII.

That the Gardner Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Gardner, Kansas, and its inhabitants.

XIII.

That the Kansas Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Independence, Kansas, and its inhabitants.

XIV.

That the Wyandotte County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Kansas City, Kansas, and Rosedale, Kansas, and the inhabitants thereof.

XV.

That the Citizens Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of

Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Lawrence, Kansas, and its inhabitants.

XVI.

That the Leavenworth Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city
17 of Leavenworth, Kansas, and its inhabitants.

XVII.

That the Johnson County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Lenexa, Merriam and Shawnee, Kansas, and the inhabitants thereof.

XVIII.

That the Ottawa Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Ottawa, Kansas, and its inhabitants.

XIX.

That the Olathe Gas and Distributing Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the city of Olathe, Kansas, and its inhabitants.

XX.

That the Parsons Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Parsons and Dennis, Kansas, and the inhabitants thereof.

XXI.

That the Kansas Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Pittsburg, Kansas, and its inhabitants.

XXII.

That the Richmond and Princeton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the
18 business of furnishing and distributing natural gas to the cities of Richmond, Princeton and Scipio, Kansas, and the inhabitants thereof.

XXIII.

That the Kansas Farmers Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas in the city or town of South Park, Kansas, and to its inhabitants, and in the vicinity thereof.

XXIV.

That G. J. Swan, Receiver of the Consumers Light, Heat and Power Company of Topeka, Kansas, a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, is engaged in the business of furnishing and distributing natural gas to the cities of Topeka and Oakland, Kansas, and the inhabitants thereof.

XXV.

That the Tonganoxie Oil and Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Tonganoxie and Reno, Kansas, and the inhabitants thereof.

XXVI.

That the Baltic Operating Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Thayer, Kansas, and its inhabitants.

XXVII.

That the Weir Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Weir City, Kansas, and its inhabitants.

19

XXVIII.

That the Wellsville Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Wellsville and Le Loup, Kansas, and the inhabitants thereof.

XXIX.

That the Tyro Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Tyro, Kansas, and its inhabitants.

XXX.

That the City of Chanute, Kansas, is a municipal corporation duly organized under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the said City of Chanute, Kansas, and its inhabitants.

XXXI.

That the said defendant, the Kansas Natural Gas Company, is a public utility and is now and for more than one year last past has been engaged in the transportation and sale of natural gas to the above named distributing companies, furnishing and distributing natural gas to said cities and the inhabitants thereof in the State of Kansas.

XXXII.

That prior to about April 25, 1922, the said defendant maintained and charged a rate of 35 cents per 1,000 cubic feet of natural gas at the city gates of said cities; that said rate of 35 cents per 1,000 cubic feet of natural gas was authorized by an order of the District Court of the United States for the District of Kansas, First Division, under date of January 20, 1920, and approved by an order of the Public Utilities Commission of the State of Kansas under date of August 18, 1920.

20

XXXIII.

That under date of April 1, 1922, the said defendant notified the above named distributing companies in writing that on and after the April, 1922, meter reading, said distributing companies would be charged at the rate of 40 cents per thousand cubic feet for all gas delivered to them at the town border measuring station.

That the following letter, addressed to the Consumers Light, Heat and Power Company, is a copy of an identical notice which was sent by the defendant to each of said distributing companies:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

Consumers Light, Heat & Power Co., Topeka, Kansas.

GENTLEMEN: You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch. Very truly yours, Kansas Natural Gas Co. By H. L. Montgomery."

That the April, 1922, meter reading date is April 25, 1922.

XXXIV.

That said defendant is at the time of the filing of this petition charging a rate of 40 cents per thousand cubic feet of natural gas furnished at the city gates of the cities of Kansas served with natural gas by the distributing companies hereinbefore named.

XXXV.

That no application was made, presented to or filed with the Public Utilities Commission of the State of Kansas by the said defendant, the Kansas Natural Gas Company, for permission to change its rate of 35 cents per thousand cubic feet of gas at the city gates of said cities to said rate of 40 cents per thousand cubic feet of natural gas so furnished.

21

XXXVI.

That the Public Utilities Commission of the State of Kansas has not in any way or manner consented to, permitted or ordered the change in said rate of 35 cents per thousand cubic feet of gas, or to collect the rate of 40 cents per thousand cubic feet of natural gas so furnished to said cities.

XXXVII.

That the said defendant, the Kansas Natural Gas Company, has wrongfully and unlawfully changed the rate lawfully in effect for natural gas at the city gates of said cities without the consent of the Public Utilities Commission for the State of Kansas, and will continue to charge and collect from said distributing companies the increased rate of 40 cents per thousand cubic feet for natural gas at the city gates of said cities, unless said defendant shall be required by an order of this Honorable Court to reestablish and maintain the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities.

XXXVIII.

That said plaintiff and the distributing companies furnishing and distributing natural gas to the cities of Kansas and the inhabitants thereof referred to herein, have no adequate remedy in the ordinary and usual course of the law to compel the defendant, the Kansas Natural Gas Company, to reestablish the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities, and to maintain the same until consent is obtained by said defendant from the Public Utilities Commission of the State of Kansas to change said rate of 35 cents per thousand cubic feet of natural gas.

XXXIX.

That on April 25, 1922, the intervening petitioner herein file- a petition in the Supreme Court of the State of Kansas, praying for an alternative writ of mandamus directed to the defendant, the Kansas Natural Gas Company, commanding said defendant to proceed forthwith to reestablish and maintain the rate of 35 cents per thousand cubic feet of natural gas furnished to the distributing companies named herein at the city gates of said cities until consent to
22 change the said rate has been obtained from the Public Utilities Commission for the State of Kansas, or show cause to this Court on or before the — day of April, 1922, why it does not do so.

That on the said 25th day of April, 1922, the Supreme Court of the State of Kansas, by Wm. A. Johnston, Chief Justice of said Court, issued an alternative writ of mandamus as prayed for in said petition, returnable on the 1st day of May, 1922.

That on the same day, April 25, 1922, the Chief Justice of the Supreme Court of the State of Kansas issued an order in said case commanding the defendant, the Kansas Natural Gas Company, to continue to furnish natural gas to said distributing companies at the city gates at the rate of 35 cents per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing companies pending the final determination of the issues involved in the above entitled case.

Copies of said alternative writ and order are attached hereto, marked Exhibits "A" and "B" respectively and made a part hereof, the same as if set out herein in full.

Wherefore, your intervener prays:

1. That subpœna issue out of this Honorable Court, directed to The Kansas Natural Gas Company as defendant herein, requiring and commanding it to appear in this cause on a day certain and answer the several allegations of this intervening petition.

2. That a temporary restraining order be issued herein, restraining and enjoining the defendant, The Kansas Natural Gas Company, from collecting or attempting to collect, from the gas distributing companies named in this petition the rate named in its notice dated April 1, 1922, until it shall have procured the consent of the Public Utilities Commission for the State of Kansas to charge said in-

creased rate, and that at the final hearing of this case the temporary injunction prayed for herein shall be made perpetual. A. E. Helm, Attorney for the Public Utilities Commission for the State of Kansas.

23 STATE OF KANSAS,
Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing petition and knows the contents thereof and that the matters therein stated are true. A. E. Helm.

Subscribed and sworn to before me this 3d day of May, 1922. Cora M. Johnson, Notary Public. [Seal.] My commission expires Nov. 23, 1925.

Exhibit "A" to Intervening Petition.

Copy.

In the Supreme Court of the State of Kansas.

No. 24307.

THE STATE OF KANSAS on the Relation of A. E. HELM, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE KANSAS NATURAL GAS COMPANY, Defendant.

Alternative Writ of Mandamus.

Whereas, There has been filed in this court a petition and motion for alternative writ of mandamus in words and figures as follows, to-wit:

24 In the Supreme Court of the State of Kansas.

No. 24307.

THE STATE OF KANSAS on the Relation of A. E. HELM, Attorney for the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE KANSAS NATURAL GAS COMPANY, Defendant.

Petition and Motion for Alternative Writ of Mandamus.

Now comes said plaintiff and for cause of action against said defendant alleges:

Petition of Intervention

I.

That Clyde M. Reed, H. A. Russell and Jesse W. Greenleaf are the duly appointed, qualified and acting members of the Public Utilities Commission of the State of Kansas, and as such constitute the Public Utilities Commission of the State of Kansas.

II.

That A. E. Helm is the duly appointed, qualified and acting attorney for the Public Utilities Commission of the State of Kansas.

III.

That on the 25th day of April, 1922, and prior to the filing of this petition, the said Public Utilities Commission of the State of Kansas entered an order directing that said A. E. Helm begin and prosecute an action in the Supreme Court of the State of Kansas against the above named defendant, for the purpose of procuring an order from said court directing the said defendant to reinstate and maintain in the future the rate of 35 cents per thousand cubic feet of natural gas furnished by the defendant to the distributing companies at the city gates of the cities obtaining their supply of natural gas from pipe lines of the defendant in the State of Kansas, until the defendant has obtained the consent of the Public Utilities Commission for the State of Kansas to change said rate.

IV.

That the said Kansas Natural Gas Company is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business in the State of Kansas under the laws of the State of Kansas.

25

V.

That the Atchison Railway Light & Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the City of Atchison, Kansas and its inhabitants.

VI.

That the American Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Altamont, Galena, Oswego, Columbus, Cherokee and Scammon, Kansas, and the inhabitants thereof.

VII.

That the Baldwin Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the City of Baldwin, Kansas and its inhabitants.

VIII.

That the Coffeyville Gas & Fuel Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Coffeyville and Liberty, Kansas, and the inhabitants thereof.

IX.

That the Anderson County Light & Heat Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Colony, and Welda, Kansas, and the inhabitants thereof.

X.

That the Tri-City Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Cherryvale, Kansas, and its inhabitants.

26

XI.

That the Edgerton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Edgerton, Kansas, and its inhabitants.

XII.

That the Gardner Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Gardner, Kansas, and its inhabitants.

XIII.

That the Kansas Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Independence, Kansas, and its inhabitants.

XIV.

That the Wyandotte County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Kansas City, Kansas, and Rosedale, Kansas, and the inhabitants thereof.

XV.

That the Citizens Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Lawrence, Kansas and its inhabitants.

XVI.

That the Leavenworth Light, Heat and Power Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Leavenworth, Kansas and its inhabitants.

27

XVII.

That the Johnson County Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Lenexa, Miriam and Shawnee, Kansas, and the inhabitants thereof.

XVIII.

That the Ottawa Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Ottawa, Kansas, and its inhabitants.

XIX.

That the Olathe Gas and Distributing Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the furnishing and distribution of natural gas to the city of Olathe, Kansas, and its inhabitants.

XX.

That the Parsons Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws

of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Parsons and Dennis, Kansas, and the inhabitants thereof.

XXI.

That the Kansas Gas and Electric Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Pittsburg, Kansas, and its inhabitants.

XXII.

That the Richmond and Princeton Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Richmond, Princeton and Scipio, Kansas, and the inhabitants thereof.

28

XXIII.

That the Kansas Farmers Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas in the city or town of South Park, Kansas, and to its inhabitants, and in the vicinity thereof.

XXIV.

That G. J. Swan, Receiver of the Consumers Light, Heat and Power Company of Topeka, Kansas, a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, is engaged in the business of furnishing and distributing natural gas to the cities of Topeka and Oakland, Kansas, and the inhabitants thereof.

XXV.

That the Tonganoxie Oil and Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Tonganoxie and Reno, Kansas, and the inhabitants thereof.

XXVI.

That the Baltic Operating Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Thayer, Kansas and its inhabitants.

XXVII.

That the Weir Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Weir City, Kansas and its inhabitants.

XXVIII.

That the Wellsville Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the cities of Wellsville and
29 Le Loup, Kansas, and the inhabitants thereof.

XXIX.

That the Tyro Gas Company is a corporation duly organized and authorized to do business in the State of Kansas under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the city of Tyro, Kansas and its inhabitants.

XXX.

That the City of Chanute, Kansas, is a municipal corporation duly organized under the laws of the State of Kansas, and is engaged in the business of furnishing and distributing natural gas to the said City of Chanute, Kansas and its inhabitants.

XXXI.

That the said defendant, the Kansas Natural Gas Company, is a public utility and is now and for more than one year last past has been engaged in the transportation and sale of natural gas to the above named distributing companies, furnishing and distributing natural gas to said cities and the inhabitants thereof in the State of Kansas.

XXXII.

That prior to about April 25, 1912, the said defendant maintained and charged a rate of 35 cents per 1,000 cubic feet of natural gas at the city gates of said cities; that said rate of 35 cents per 1,000 cubic feet of natural gas was authorized by an order of the District Court of the United States for the District of Kansas, First Division, under date of January 20, 1920, and approved by an order of the Public Utilities Commission of the State of Kansas under date of August 18, 1920.

XXXIII.

That under date of April 1, 1922, the said defendant notified the above named distributing companies in writing that on and after the April 1922, meter reading, said distributing companies would be charged at the rate of 40 cents per thousand cubic feet for all gas delivered to them at the town border measuring station.

That the following letter, addressed to the Consumers Light, Heat and Power Company, is a copy of an identical notice which
30 was sent by the defendant to each of said distributing companies:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

Consumers Light, Heat & Power Co., Topeka, Kansas.

GENTLEMEN: You are hereby notified that on and after April 1, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces, atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch. Very truly yours, Kansas Natural Gas Co. By H. L. Montgomery."

That the April, 1922, meter reading date is April 25, 1922.

XXXIV.

That said defendant is at the time of the filing of this petition charging a rate of 40 cents per thousand cubic feet of natural gas furnished at the city gates of the cities of Kansas served with natural gas by the distributing companies hereinbefore named.

XXXV.

That no application was made, presented to or filed with the Public Utilities Commission of the State of Kansas by the said defendant, the Kansas Natural Gas Company, for permission to change its rate of 35 cents per thousand cubic feet of gas at the city gates of said cities to said rate of 40 cents per thousand cubic feet of natural gas so furnished.

XXXVI.

That the Public Utilities Commission of the State of Kansas has not in any way or manner consented to, permitted or ordered the change in said rate of 35 cents per thousand cubic feet of gas, or to collect the rate of 40 cents per thousand cubic feet of natural gas so furnished to said cities.

XXXVII.

That the said defendant, the Kansas Natural Gas Company, has wrongfully and unlawfully changed the rate lawfully in effect for natural gas at the city gates of said cities without the consent
31 of the Public Utilities Commission for the State of Kansas, and will continue to charge and collect from said distributing companies the increased rate of 40 cents per thousand cubic feet for natural gas at the city gates of said cities, unless said defendant shall be required by an order of this Honorable Court to reestablish and maintain the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities.

XXXVIII.

That said plaintiff and the distributing companies furnishing and distributing natural gas to the cities of Kansas and the inhabitants thereof referred to herein, have no adequate remedy in the ordinary and usual course of the law to compel the defendant, the Kansas Natural Gas Company, to reestablish the lawful rate of 35 cents per thousand cubic feet of natural gas at the city gates of said cities, and to maintain the same until consent is obtained by said defendant from the Public Utilities Commission of the State of Kansas to change said rate of 35 cents per thousand cubic feet of natural gas.

Wherefore, plaintiff moves the Court and prays for an alternative writ of mandamus directed to the defendant, the Kansas Natural Gas Company, commanding said defendant to proceed forthwith to reestablish and maintain the rate of 35 cents per thousand cubic feet of natural gas furnished to said distributing companies at the city gates of said cities, until consent to change the said rate has been obtained from the Public Utilities Commission of the State of Kansas, or to show cause to this Court on or before the — day of April, 1922, why it does not do so. A. E. Helm, Attorney for the Public Utilities Commission of the State of Kansas.

STATE OF KANSAS,
Shawnee County, ss:

A. E. Helm, of lawful age, being duly sworn on oath, says that he is the duly appointed, qualified and acting attorney for the Public Utilities Commission for the State of Kansas, and that he has read the foregoing petition and knows the contents thereof and that the matters therein stated are true. A. E. Helm.

32 Subscribed and sworn to before me this 25th day of April, 1922. Cora M. Johnson, Notary Public. My commission expires Nov. 23, 1925.

And it being agreeable to me that justice be speedily done in the premises, and that all lawful relief be speedily granted to the plaintiffs in this petition:

Now, Therefore, you, The Kansas Natural Gas Company, are hereby commanded to proceed forthwith to reinstate and reestablish the rate of Thirty-five Cents (35¢) per thousand cubic feet at the city gates for natural gas furnished by you to the distributing companies named in said petition, and to maintain said rate in effect until the consent of the Public Utilities Commission for the State of Kansas shall have been obtained to change the same, or that you show cause to this court on or before the 1st day of May, 1922, why you should not do so, and then and there return this writ. Wm. A. Johnston, Chief Justice.

"Exhibit B" to Intervening Petition.

Copy.

In the Supreme Court of the State of Kansas.

No. 24307.

THE STATE OF KANSAS on the Relation of A. E. HELM, Attorney for
the Public Utilities Commission of the State of Kansas, Plaintiff,

vs.

THE KANSAS NATURAL GAS COMPANY, Defendant.

Incidental Order.

Whereas it has been made to appear to the court that the defendant, the Kansas Natural Gas Company, intends to and will discontinue the furnishing of natural gas to the distributing companies named in the petition filed in the above entitled case unless said distributing companies immediately enter into an agreement
33 with the Kansas Natural Gas Company to pay the increased
rate of 40 cents per thousand cubic feet of natural gas at the
city gates:

It is therefore by the court ordered; that the Kansas Natural Gas Company be, and it is hereby, commanded to continue to furnish natural gas to said distributing companies at the city gates at the rate of 35 cents per thousand cubic feet, and not to discontinue the furnishing of natural gas to said distributing companies, pending the final determination of the issues involved in the above entitled case. Wm. A. Johnston, Chief Justice.

Service of the above entitled order is hereby acknowledged for the Kansas Natural Gas Company. By Robert Garver, Attorney for Defendant.

[File endorsement omitted.]

**Answer of Defendant, Kansas Natural Gas Company, to
Intervening Petition.**

[Filed May 26, 1922.]

Comes now the Kansas Natural Gas Company and for its Answer to the intervening petition of the Public Utilities Commission of the State of Kansas, says:

I.

It admits all of the allegations of fact contained in paragraphs I to XXX, inclusive, of plaintiff's petition.

II.

It admits the facts alleged in paragraph XXXI of Plaintiff's petition except the allegation that it is a public utility within the meaning of the Statutes of Kansas conferring jurisdiction over public utilities upon the Public Utilities Commission, of said State.

III.

It admits the allegations of fact contained in paragraph XXXII of Plaintiff's petition, except that in the cities named in paragraphs VI, VIII, X, XIII, a rate other than thirty-five (\$0.35) cents was in effect, established as alleged by plaintiff.

IV.

It admits the allegations of fact contained in paragraph XXXIII of plaintiff's petition, except that no notice was sent to companies serving the cities of Coffeyville, Cherryvale, Independence, Ottawa, Olathe Tyro, or Chanute, and no attempt was made to change the existing rates in said cities.

V.

It admits the allegations of fact contained in paragraph XXXIV of Plaintiff's petition, with the exceptions stated in number three of this answer.

VI.

It admits the allegations of fact contained in paragraph XXXV of Plaintiff's petition.

VII.

It admits the allegations of fact contained in paragraph XXXVI of plaintiff's petition.

VIII.

35 It denies that it has wrongfully or unlawfully changed the rate formerly charged by it for gas at the city gates of said cities, but admits that it has announced an increased rate without the consent of the Public Utilities Commission, and that it will continue to charge and collect from said distributing companies the increased rate of forty (\$0.40) cents per thousand cubic feet for natural gas at the city gates of said cities unless prevented from doing so by this Honorable Court.

IX.

Answering the amendment to Plaintiff's Intervening Petition as the same appears by stipulation filed herein, this Defendant admits that none of the Distributing Companies on its system have entered into any contracts with it and admits that none has agreed nor consented to pay its said sum of forty cents (\$0.40) per thousand cubic feet and admits that some of said companies have refused to so agree or to pay said sum of forty cents (\$0.40) per thousand cubic feet until authorized so to do by the Public Utilities Commission of the State of Kansas.

X.

For further answer to said intervening petition and for cause why it has not performed the things therein referred to, said Kansas Natural Gas Company respectfully represents that it is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipe line running from the State of Oklahoma, across the State of Kansas, and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipe line 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma, and entered said pipe line in said State, the remainder thereof being produced in the State of Kansas and entering said pipe line in that State; that of the total amount of gas so transported, 5,164,121,000 cubic feet or forty-eight (48%) per cent was delivered in the State of Kansas, and 5,558,959,000 cubic feet, or fifty two (52%) per cent was delivered in the State of Missouri; that said gas obtained in Oklahoma and in Kansas is intermingled in said pipe line and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of Kansas into the State of Missouri; that said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates for an agreed price; that the figures above given for the year ending December 31st, 1921, represent an average year, in so far as showing the relative proportion of gas delivered in Kansas and Missouri, but do not correctly represent the average relative re-

ceipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of the gas shown to have been produced in the State of Kansas, was received from the Colony Field in Anderson County, Kansas, which field, at its present rate of decline will have practically no gas available for the use of said pipe line in supplying the demand for the winter of 1922, at which time practically all of the gas supplied to Kansas and Missouri, as shown by the 1921 figures above given, will have to be purchased in, and transported from, the State of Oklahoma.

XI.

Said Kansas Natural Gas Company further alleges that its business, as above set out, constitutes commerce among the States of a national character, which is not subject to regulation by the Public Utilities Commission of the State of Kansas, and that it has the legal right to charge the several distributing companies set out in plaintiff's petition such reasonable and just rates for gas delivered to them as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority so to do.

XII.

Said Kansas Natural Gas Company further alleges that the rate of
37 forty (\$0.40) cents per thousand cubic feet for gas delivered to the city gates of the several distributing companies set out in plaintiff's petition is a just and reasonable rate and is necessary to be charged by said Kansas Natural Gas Company in order to secure to it a reasonable return on the value of its property used and useful in connection with the service rendered, and that a less rate would be unremunerative, non-compensatory, and confiscatory.

Wherefore, having fully answered, defendant prays that the relief sought by plaintiff herein be denied and that the several orders issued against defendant herein be set aside and for such other and further relief as to this Honorable Court may seem just and equitable. The Kansas Natural Gas Company, By H. O. Caster, Robt. D. Garver, R. J. Higgins, and Fred Robertson, Attorneys.

[File endorsement omitted.]

In United States District Court.

Stipulation for Amendment to Intervening Petition of Public Utilities Commission.

[Filed May 19, 1922.]

It is hereby stipulated by and between the parties to the above entitled cause that the intervener, the State of Kansas, ex rel. A. E. Helm, Attorney for the Public Utilities Commission for the State of

Kansas, may amend its intervening petition filed herein by adding at the end of Paragraph 34 the following:

Plaintiff further alleges on information and belief that said distributing companies have not entered into any contracts with said Kansas Natural Gas Company, and have not consented nor agreed to pay said Kansas Natural Gas Company said forty cents (40¢) per thousand cubic feet for said natural gas so furnished at city gates of said cities; and that said companies refuse to agree so to do and refuse to pay said forty cents (40¢) per thousand cubic feet for said gas until authorized so to do by the Public Utilities Commission for the State of Kansas.

It is further stipulated that said amendment may be considered by the Court the same as though it has been made a part of said paragraph in the original petition of intervention, and further that the answers of the defendant and the Receiver of the Consumers Light, Heat and Power Company to said intervening petition may be treated as answers to said petition as amended.

It is further stipulated that the filing of said amendment shall in no manner affect the time of the hearing of the case as the same is now set for hearing by the Court. Dated May 10, 1922. A. E. Helm, Attorney — Public Utilities Commission for the State of Kansas. H. O. Caster, Robt. D. Garver, Attorneys for Kansas Natural Gas Co. Thomas F. Doran, Attorney for G. J. Swan, Receiver for the Consumers Light, Heat and Power Company.

[File endorsement omitted.]

In United States District Court.

Answer of G. J. Swan, Receiver, to Amended Intervening Petition.

[Filed May 26, 1922.]

Comes, now, the above named G. J. Swan, Receiver of the Consumers Light, Heat and Power Company, and for his answer to the amended intervening petition of the State of Kansas filed herein by A. E. Helm, attorney for the Public Utilities Commission of the State of Kansas, admits all the allegations thereof consistent with the petition of G. J. Swan, Receiver, filed herein; and denies each and every, all and singular the material allegations of said intervening petition inconsistent therewith.

And this answering plaintiff further specifically alleges that while it is true, after the holding of the Public Utilities Commission of the State of Kansas, denying the right of the Kansas Natural Gas Company to increase its rates to the distributing companies without the consent of the Public Utilities Commission of Kansas, he notified the Kansas Natural Gas Company that he would not pay the increased rate of forty cents at the City Gates established by notice of the Kansas Natural Gas Company of April 1, 1922. Said notice of this answering plaintiff to the Kansas Natural Gas Com-

pany that he would not pay the increased rate was a mere assertion to question the right of the Kansas Natural Gas Company to make the increase demanded, and that it is the opinion of this answering plaintiff that there is no legal reason which will sustain his refusal to pay said added rate if the same shall by this court be determined to be reasonable, just and necessary; that the said rate is being charged against this answering plaintiff and that he will have to pay the same unless this court acting in equity permanently enjoins the collection thereof.

Wherefore, plaintiff prays judgment herein in accordance with the prayer of his original petition filed herein on the 19th day of April, 1922. Thomas F. Doran, Attorney for G. J. Swan, Receiver Consumers Heat, Light & Power Co.

[File endorsement omitted.]

In United States District Court.

**Answer of Kansas Natural Gas Company to Petition of
G. J. Swan, Receiver.**

[Filed May 1, 1922.]

Comes now the Kansas Natural Gas Company, a corporation organized under the Laws of the State of Delaware, and duly authorized to transact business in the State of Kansas and for answer to the petition of G. J. Swan, Receiver of the Consumers Light, Heat & Power Company, filed herein April 19, 1922, says:

I.

It admits the allegations of fact contained in paragraphs 1 to 8, inclusive, of said petition.

II.

It denies that the rate of forty (\$0.40) cents per thousand cubic feet of gas delivered to the receiver of said Consumers Light, Heat and Power Company at the city gate of the City of Topeka is excessive or unreasonable, but on the contrary alleges the fact to be that said rate is just and reasonable and is necessary to be charged by said Kansas Natural Gas Company in order to secure to it a reasonable return on the value of its property used and useful in connection with the service rendered and that a less rate would be unremunerative, non-compensatory, and confiscatory.

III.

Further answering, said Kansas Natural Gas Company says: that it is engaged in the business of buying, transporting and selling natural gas in commerce among the States of Oklahoma, Kansas and Missouri; that it maintains a pipe line running from the State

of Oklahoma, across the State of Kansas, and into the State of Missouri; that for the year ending December 31st, 1921, it transported through said pipe line 11,013,408,000 cubic feet of natural gas, 7,216,718,000 cubic feet of which was produced in the State of Oklahoma and entered said pipe line in said State, the remainder thereof being produced in the State of Kansas and entering said pipe line in that State; that of the total amount of gas so transported, 5,164,121,000 cubic feet or forty eight (48%) per cent was delivered in the State of Kansas and 5,558,959,000 cubic feet, or fifty two (52%) per cent was delivered in the State of Missouri; that said gas obtained in Oklahoma and in Kansas is intermingled in said pipe line and flows in a common stream from the State of Oklahoma into the State of Kansas and through the State of Kansas into the State of Missouri; that said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Kansas and does not operate any distributing companies, but sells gas to distributing companies at the respective city gates for an agreed price; that the figures above given for the year ending December 31st, 1921, represent an average year, in so far as showing the relative proportion of gas delivered in Kansas and Missouri, but do not correctly represent the average relative receipts of gas from Oklahoma and Kansas for the reason that during said year 1,300,000,000 cubic feet of the gas shown to have been produced in the State of Kansas was received from the Colony Field in Anderson County, Kansas, which

41 field, at its present rate of decline, will have practically no gas available for the use of said pipe line in supplying the demand for the winter of 1922, at which time practically all of the gas supplied to Kansas and Missouri, as shown by the 1921 figures above given, will have to be purchased in, and transported from, the State of Oklahoma.

IV.

Said Kansas Natural Gas Company further alleges that its business, as above set out, constitutes commerce among the States of a national character which is not subject to regulation by the Public Utilities Commission of the State of Kansas, and that it has the legal right to charge the receiver herein and its other customers such reasonable and just rates for gas delivered as it may desire without the consent of the Public Utilities Commission of Kansas and without making application to said Commission for authority to do so.

Wherefore, said Kansas Natural Gas Company prays this Honorable Court that the rate of forty (\$0.40) cents per thousand cubic feet of gas delivered at the city gate of said Consumers Light, Heat and Power Company, to be measured as provided in said notice of April 1st, 1922, be decreed to be just and reasonable, and a valid and legal charge against said Receiver, and that said Receiver be directed to make payment accordingly for gas delivered to him from and after April 25th, 1922, and for such other and further relief in the premises as to this Honorable Court may seem just and equitable. H. O. Caster, Robt. D. Garver, Attorneys for Kansas Natural Gas Company.

[File endorsement omitted.]

Reply of G. J. Swan, Receiver, to Answer.

[Filed May 3, 1922.]

Comes now G. J. Swan, Receiver of The Consumers Light, Heat and Power Company, complainant in petition filed herein on April 19, 1922, and for his reply to the answer of The Kansas Natural Gas Company, denies each and every, all and singular the allegations of said answer which are inconsistent with the allegations of petition filed by G. J. Swan, Receiver, on April 19, 1922.

Wherefore, Plaintiff prays for the relief asked in his said petition filed April 19, 1922. Thomas F. Doran, Attorney for G. J. Swan, Receiver.

[File endorsement omitted.]

In United States District Court.

Order of Submission.

[Filed May 26, 1922.]

Now, on this 26th day of May A. D. 1922, the above entitled cause came regularly on to be heard by the court on the single question of law presented by the pleadings, namely, whether or not the Kansas Utilities Commission has jurisdiction of, and control over the rates which shall be charged by the Kansas Natural Gas Company and exacted by it from the Receiver of the Consumers Light, Heat and Power Company;

It is ordered, on agreement of counsel made in open court, this cause may be submitted, and the same may be taken under advisement by the court for determination of said question of law at as early a date as the same may be reached by the court. And this cause is submitted to the Court for determination on this question alone. John C. Pollock, U. S. District Judge.

[File endorsement omitted.]

Memorandum Opinion, Pollock, J.

[Filed June 16, 1922.]

The single question now presented to the Court for decision in this suit is this, namely: Is the business done by The Kansas Natural Gas Company, (hereinafter called the "Natural Company") a Delaware corporation, engaged in the business of producing and buying natural gas, mostly in the state of Oklahoma, also in this state, and

transporting the same through pipe lines in this state and through this state into the state of Missouri and delivering the same to distributing companies to be delivered by said companies to their customers, in its nature such business as is under the control and subject to the regulation of the Public Utilities Commission of the State of Kansas in the matter of rates or price per thousand cubic feet which may be charged by the Natural Company for the gas so transported, sold and furnished the distributing companies at the intake of said distributing companies' lines at the gates of the cities?

This question arises and is now presented for determination in the following manner.

One G. J. Swan is the Receiver, duly appointed, in the above entitled and numbered suit in this court, over the property and assets of defendant, the Consumers Light, Heat & Power Company, a corporation, created for the purpose of furnishing light, heat and power to the city of Topeka and its inhabitants in this State and the adjoining town of Oakland. Said Receiver was through the gas system of defendant Light Heat and Power Company engaged in the business of

44 so furnishing gas at the time this litigation arose. The only source of supply of natural gas which said Receiver has or can procure is from the Natural Company. The rate fixed and price charged by the Natural Company prior to the first day of April this present year for gas furnished and delivered to said Receiver at the city gate was the sum of thirty five cents per thousand cubic feet. However, on April first said Receiver was by the Natural Company notified, as follows:

"Kansas Natural Gas Company.

Bartlesville, Oklahoma, April 1, 1922.

"Consumers Light, Heat & Power Co., Topeka, Kansas.

GENTLEMEN: You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces atmospheric pressure atmospheric pressure being assumed to be 14.41 pounds per square inch. Very truly yours, Kansas Natural Gas Co.,
By H. L. Montgomery."

This same proposed increase in rates from thirty five to forty cents per thousand cubic feet was made as to all cities and town- of this State without presentation of the right to so do to the Public Utilities Commission of this State, or receiving any authority from that source. Thereupon, the Receiver of defendant Consumers Light, Heat and Power Company filed in this suit his complaint praying an injunction against the Natural Company restraining said company from charging the proposed rate of forty cents per thousand cubic feet on the ground said rate was confiscatory in view of the only rate

it is by the Public Utilities Commission allowed to charge its customers.

Thereupon, a restraining order was granted the Receiver and the Public Utilities Commission, through its solicitor, in the name of the State, intervened herein, praying an injunction against the Natural Company restraining it from charging or collecting from any distributing company located in this State said increase in price of gas from thirty five to forty cents a thousand cubic feet, on the

45 ground such proposed increase or charge for gas is unlawful and void because not authorized by the Public Utilities Commission of this State.

Thus is raised the issue of the power, jurisdiction and control of the Public Utilities Commission of this State over the business done by the Natural Company within this State.

Coming now to the consideration of this question, it may be said: The Natural Company owns and exercises no franchise rights in this State acquired from the State or any of its municipal bodies. It is a foreign corporation owning a pipe line system and is producing or purchasing natural gas in Oklahoma, this State, and transporting it from Oklahoma into and through this State into the State of Missouri, and delivering the same to some forty odd local gas companies holding franchises from the several cities in which they are located for the distribution and sale of natural gas therein. In the transaction of its business the Natural Company is engaged solely and alone in interstate commerce business within this State and does no local business whatever. This is conceded. The local companies to which the Natural Company sells its gas do a purely local business, hence, unquestionably are subject to the jurisdiction and control of the Public Utilities Commission of this State so far as located within this State. The question, however, is as to that business which is transacted by the Natural Company. This question, I find, has been presented to and received consideration from the Supreme Court in the case of Public Utilities Commission v. Landon, 249 U. S. 236, wherein Mr. Justice McReynolds, delivering the opinion for the court, said, in speaking of the business conducted by the Natural Company, as follows:

"The court below held the business carried on by the receivers—transportation of natural gas and its disposition and sale to consumers through the distributing companies—was interstate commerce of a national character; that the commissions' actions interfered with establishment and maintenance of reasonable sale rates and thereby burdened interstate commerce and took the receivers' property without due process of law; that the original supply contracts were not binding upon the receivers. And it accordingly enjoined the commissions, their members, the attorneys general of both States, the various municipalities and the distributing companies from interfering with establishment of such reasonable and compensatory rates as the court might approve.

* * * * *

46 "That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State. *American Express Co. v. Iowa*, 196 U. S. 133, 143; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217.

* * * * *

"Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *The Pipe Line Cases*, 234 U. S. 548, 500. The thing which the receivers actually did was to deliver supplies to local companies. Exercising franchise rights, the latter distributed and sold the commodity so obtained upon their own account and paid the receivers what amounted to two-thirds of their receipts from customers. Interstate movement ended when the gas passed into local mains."

The business then being conducted by the Receiver of the Natural Company differed from that now being conducted by the Natural Company in the fact that the gas transported by the Natural Company in that case was turned over to and distributed by the local gas companies under divisional orders of proceeds, whereas, in the present case the gas is sold outright and delivered to the distributing companies at the city gates. This fact more strongly disassociates the Natural Company from any local business whatever.

The case of *Penna. Gas Co. v. Pub. Service Comm.* 252 U. S. 23, is much relied upon by those insisting upon control of the business by the Public Utilities Commission. That was a case in which the Pennsylvania Company was engaged in both the interstate business of transporting natural gas from Pennsylvania into the State of New York for sale, and, also, under certain franchise rights granted to it by the City of Jamestown, New York, was distributing and delivering the gas to its customers at the burners tips in the city.

Mr. Justice Day, delivering the opinion of the court, and distinguishing that case from the *Landon* case, said:

"We think that the transmission and sale of natural gas produced in one State, transported by means of pipe lines and directly furnished to consumers in another State, is interstate commerce within the principles of the cases already determined by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105.

47 "This case differs from *Public Utilities Commission v. Landon*, 249 U. S. 236, wherein we dealt with the piping of natural gas from one State to another, and its sale to independent local gas companies in the receiving State, and held that the retailing of gas by the local companies to their consumers was intrastate commerce and not a continuation of interstate commerce, although

the mains of the local companies receiving and distributing the gas to local consumers were connected permanently with those of the transmitting company. Under the circumstances set forth in that case we held that the interstate movement ended when the gas passed into the local mains; that the rates to be charged by the local companies had but an indirect effect upon interstate commerce and, therefore, the matter was subject to local regulation."

Now the contention of those here seeking to have the business of the Natural Company controlled by the Public Utilities Commission of the State under state laws, is this: As the Federal Government has not attempted to exercise that exclusive control over the interstate business of the Natural Company which the commerce clause of the Federal Constitution confers upon it, therefore the State, through its Public Utilities Commission may exercise that control so conferred on the Government under the commerce clause until the Federal Government takes over such control. However, it is quite well settled by authority although the business transacted be in its essential nature interstate, yet, so long as the General Government has not exercised its power conferred to regulate such commerce, the State may in incidental ways and manners impress restrictions upon interstate commerce. This is no place more aptly stated than by Mr. Justice Day in distinguishing the Landon case from the Pennsylvania Gas case then at bar, in which it is said as follows:

"The general principle is well established and often asserted in the decisions of this court that the State may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Commission to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself.

"In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, when needed to protect or regulate matters of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that there existed in the States

a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation," &c.

However, the control which the Public Utilities Commission of the State here asserts over the business done by the Natural Company within this State is in no sense, manner or way incidental in its nature under the law creating the Commission, but is full, absolute and complete regulation and control over the interstate business of the Natural Company, precisely the same in its nature as it holds and exercises over the business of the local distributing companies, even

to the extent of establishing the prices to be charged for what it transports into the State in interstate commerce and here sells at wholesale prices.

It has been often declared no more complete control can be exercised over interstate business. See *Hayman v. Hays*, 236 U. S. 178; *The Pipe Line Cases*, 234 U. S. 548; *Brown v. Maryland*, 12 Wheaton 419; *American Express Co. v. Iowa*; *Minnesota v. Barber*, 136 U. S. 313; *Schollenberger v. Pennsylvania*, 171 U. S. 1, and many other cases.

From all of which, I am persuaded beyond doubt, so long as we have the guaranty of protection afforded and intended to be afforded by the framers of our National Constitution against the complete regulation and control of purely interstate commerce under the commerce clause of the Constitution, such regulation as is here sought by the State through its Public Utilities Commission over the purely interstate business of the Natural Company cannot and should not be permitted.

It follows, the power and control attempted to be exercised by the State through its Public Utilities Commission over the interstate business of the Natural Company must be denied, and is denied. John C. Pollock, Judge. Kansas City, Kansas, June 15th, 1922.

[File endorsement omitted.]

49

In United States District Court.

Decree.

[Filed June 15, 1922.]

Now on this 15th day of June, A. D. 1922, the above entitled cause came regularly on for decision by the Court upon the sole question whether the Public Utilities Commission of the State of Kansas has power and authority to control and regulate the price which shall be fixed by the Kansas Natural Gas Company as a charge for gas sold and delivered to the Receiver of the complainant herein; this question of law being raised on the petition of G. J. Swan, Receiver, heretofore, on the 19th day of April, 1922, filed herein, and the answer of the Kansas Natural Gas Company thereto, by the intervening petition of the State of Kansas on the Relation of A. E. Helm, Attorney for the Public Utilities Commission for the State of Kansas; and the Court, having heretofore, on the 26th day of May, 1922, fully heard counsel for G. J. Swan, Receiver of the Consumers Light, Heat and Power Company, and counsel for the Kansas Natural Gas Company and counsel for the State of Kansas and the Public Utilities Commission of the State of Kansas, and having, on said date, under written order of submission, taken said question unded advisement, and having since said submission fully considered the facts and law as submitted, and being fully advised in the premises, finds:

That the power and control attempted to be exercised by the State

Petition for Appeal.

of Kansas through its Public Utilities Commission over the interstate business of the Kansas Natural Gas Company by regulating and fixing the price which it shall charge the Receiver of the Plaintiff herein for gas delivered to him by the Kansas Natural Gas Company, should be, and must be, denied and,

That this Court has full power and jurisdiction to hear and determine the questions arising on the petition of G. J. Swan, Receiver of the Consumers Light, Heat and Power Company filed herein on the 19th day of April, 1922, and the answer of the Kansas Natural Gas Company thereto, on the merits, and that this Court should hear and determine said questions on the merits in the regular course at the convenience of the Court and the parties, and that jurisdiction of this cause should be retained for said purpose.

Wherefore, it is considered, ordered and decreed by the Court that the power and control attempted to be exercised by the State of Kansas through its Public Utilities Commission over the interstate business of the Kansas Natural Gas Company by regulating and fixing the price which it shall charge the Receiver of plaintiff herein for gas delivered to him by the Kansas Natural Gas Company should be, and the same, is hereby denied.

And that this Court has full power and jurisdiction to hear and determine the questions arising on the petition of G. J. Swan, Receiver of the Consumers Light, Heat and Power Company filed herein on the 19th day of April, 1922, and the answer of the Kansas Natural Gas Company thereto, on the merits, and that this Court should, and will, hear and determine said questions on the merits in the regular course at the convenience of the court and the parties, and that jurisdiction of this cause should be, and is, retained for this purpose. John C. Pollock, Judge.

[File endorsement omitted.]

In United States District Court.

Petition for Appeal.

[Filed Sept. 15, 1922.]

To the Honorable John C. Pollock, Judge of said Court:

And now comes the State of Kansas on the relation of Fred S. Jackson, Attorney for said Public Utilities Commission, as the successor in office to A. E. Helm; and feeling itself aggrieved by the final decree of this court entered on the 5th day of June, 1922, hereby prays that an appeal may be allowed it from the said decree to the Supreme Court of the United States. In connection with this petition, petitioner herewith presents its assignment of errors. F. S. Jackson, Attorney for Intervening Defendant and Petitioner, the State of Kansas.

[File endorsement omitted.]

51

In United States District Court.

Assignment of Errors.

[Filed Sept. 15, 1922.]

Now comes the appellant, the State of Kansas, on the relation of Fred S. Jackson, attorney for the Public Utilities Commission of the State of Kansas, successor in office of A. E. Helm, by Fred S. Jackson, its Attorney, and in connection with its petition for appeal, says in the record, proceedings, and in the final decree aforesaid, manifest error has intervened to the prejudice of the appellant, to-wit:

1. The court erred in holding that the intervening petition and answer of this petitioner does not state facts sufficient to constitute a cause of action in favor of the petitioner, against the defendant and other parties to said action, and in denying this petitioner's prayer for relief in said suit, and in entering the decree and decision against this petitioner denying it relief.

2. The court erred in holding that the power, control, and regulation attempted to be exercised by the State of Kansas, thru its Public Utilities Commission, over the interstate business of the Kansas Natural Gas Company, defendant in said suit, by regulating and fixing the price which it shall charge the receiver of the plaintiff herein for gas delivered to him by the said Kansas Natural Gas Company, should and must be denied because the said Public Utilities Commission is and was without power, authority, and jurisdiction to exercise said regulatory control and power.

3. That the court erred in holding that the power and control attempted to be exercised by the state of Kansas, thru its Public Utilities Commission, over the interstate business of the Kansas Natural Gas Company, by regulating and fixing the price which it shall charge the receiver of plaintiff and complainant herein for gas delivered to him by the Kansas Natural Gas Company, should be and the same is hereby denied, and that such power and authority of the Public Utilities Commission of the State of Kansas, if exercised by it, would be an unlawful interference with interstate commerce, and a violation of the interstate commerce clause of the Constitution of the United States and for said reason denying the prayer and intervening petition of the state of Kansas, thru its Public Utilities Commission, for relief in this suit.

4. That the court erred in holding that the state of Kansas, thru its Public Utilities Commission, did not have full power, authority, jurisdiction, and regulatory control over the interstate business of the Kansas Natural Gas Company, and full power, authority, and jurisdiction to regulate and fix the price which the said Kansas Natural Gas Company should charge the receiver of plaintiff and complainant herein for gas delivered to him by the Kansas Natural Gas Company as a public utility and public service company engaged in said service of transporting and delivering gas to the receiver of the plaintiff and complainant herein.

52

Bond on Appeal.

5. That the decree is against the manifest weight of evidence herein.

6. That the decree is contrary to law and the provisions of the Constitution of the United States.

Wherefore Appellant prays that the decree of the District Court for the District of Kansas may be reversed and remanded with direction to proceed in accordance with the law. F. S. Jackson, Attorney for Appellant and Petitioner.

[File endorsement omitted.]

In United States District Court.

Bond on Appeal.

[Filed Sept. 19, 1922.]

Know all men by these presents, that we, the State of Kansas, as principal, and Fidelity and Deposit Co. of Md. as sureties, of the county of Shawnee, state of Kansas, are held and firmly bound unto the United States in the sum of \$1,000, lawful money of the United States, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves and each of our heirs, executors and administrators, by these presents.

Sealed with our seals and dated this 19th day of September, 1922.

Whereas the above-named State of Kansas, has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the district court for the District of Kansas, First Division, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named State of Kansas shall prosecute its said appeal to effect and answer all costs if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect. The State of Kansas, By William A. Smith, Atty. for P. U. Co. Fidelity and Deposit Co. of Md., By J. Newell Abrahams, Attorney-in-Fact. [Seal.]

Approved this 19th day of Sept. 1922. John C. Pollock, Judge.

[File endorsement omitted.]

In United States District Court.

Order Allowing Appeal.

[Filed Sept. 19, 1922.]

On motion of F. S. Jackson, solicitor and counsel for intervener, the State of Kansas, it is hereby ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified

transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of One Thousand Dollars. John C. Pollock, Judge. Dated Sept. 19th, 1922.

[File endorsement omitted.]

54

In United States District Court.

Stipulation for Transcript of Record.

[Filed Oct. 3, 1922.]

It is hereby stipulated by and between the Central Trust Company of New York, and the Receiver of the Consumers Light, Heat & Power Company, and the Kansas Natural Gas Company, and the Public Utilities Commission of Kansas, that the Clerk of this court be directed to prepare and certify the transcript of the record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

Petition of J. G. Swan, Receiver of the Consumers Light, Heat & Power Company of Topeka, Kansas, filed April 19, 1922.

Temporary Restraining Order issued April 19, 1922.

Order granting permission to Public Utilities Commission of Kansas to file intervening petition, filed May 5, 1922.

Intervening Petition of Public Utilities Commission of Kansas filed May 6, 1922.

Answer of defendant Kansas Natural Gas Company to Intervening Petition of Public Utilities Commission.

Stipulation providing for an amendment to the Intervening Petition of the Public Utilities Commission for the State of Kansas.

Answer of defendant J. G. Swan, Receiver of the Consumers Light, Heat & Power Company, to the amended intervening petition of the Public Utilities Commission of the State of Kansas.

Order of submission of the Question raised by the Intervening Petition of the Kansas Public Utilities Commission and the Answers of Defendants thereto.

Decree of Court denying the relief sought in the Intervening Petition of Public Utilities Commission, filed June 15, 1922.

Petition for Appeal.

Assignment of Errors.

Citation for Appeal.

55 Order Granting Appeal. F. S. Jackson, Attorney for Public Utilities Commission of Kansas, Appellant. H. O. Caster, Robt. D. Garver, Attorney- for Defendant, Kansas Natural Gas Company. Thomas F. Doran, Attorney for Receiver of Consumers Light, Heat & Power Company. Blair & Lillard, Attorney- for Central Trust Company of New York.

Clerk's Certificate.

The intervenor requests that the following pleadings be added to the above record on appeal.

Answer of Kansas Natural Gas Co. to petition of G. J. Swan, Receiver, filed May 1st, 1922.

Reply of G. J. Swan, Receiver of the Consumers Light, Heat & Power Co. to answer of the Kansas Natural Gas Co. to petition of G. J. Swan, Receiver, filed April 19, 1922; filed May 3, 1922. William A. Smith, Asst. Atty. for Public Utilities Commission of Kansas.

[File endorsement omitted.]

56

In United States District Court.

Clerk's Certificate.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in Case No. 75-N, entitled Central Trust Company of New York vs. The Consumers Light, Heat and Power Company, in said Court, as is called for by the Stipulation filed herein.

I further certify that the Original Citation is attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Topeka, in said District of Kansas, this 5th day of October, 1922. [Seal of District Court U. S., District of Kansas.] F. L. Campbell, Clerk.

Endorsed on cover: File No. 29,202. Kansas D. C. U. S. Term No. 652. The State of Kansas on the relation of Fred S. Jackson, attorney for the Public Utilities Commission of the State of Kansas, etc., appellant, vs. The Central Trust Company of New York, Kansas Natural Gas Company, and Consumers Light, Heat & Power Company. Filed October 19th, 1922. File No. 29,202.

(8907)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1922~~ 1923

No. ~~154~~ 155

STATE OF MISSOURI ON THE RELATION OF JESSE W.
BARRETT, ATTORNEY GENERAL; PUBLIC SERVICE
COMMISSION OF MISSOURI, AND KANSAS CITY GAS
COMPANY, APPELLANTS,

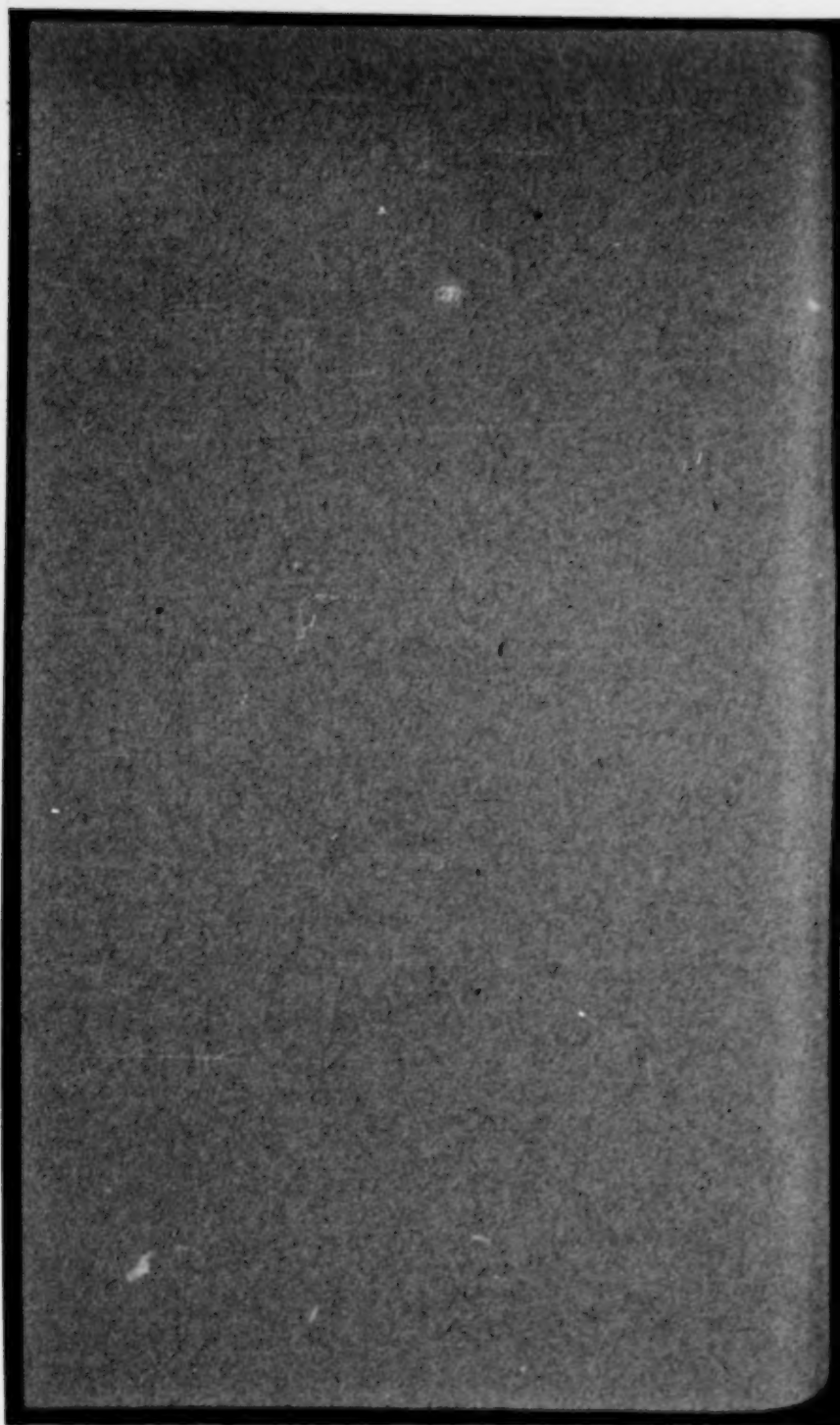
vs.

KANSAS NATURAL GAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

FILED NOVEMBER 29, 1923.

(29,258)



(29,253)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 703.

STATE OF MISSOURI ON THE RELATION OF JESSE W.
BARRETT, ATTORNEY GENERAL; PUBLIC SERVICE
COMMISSION OF MISSOURI, AND KANSAS CITY GAS
COMPANY, APPELLANTS,

vs.

KANSAS NATURAL GAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

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a In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri and Kansas City Gas Company, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Kansas Natural Gas Company, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 20th day of October, 1922, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western Division of the Western District of Missouri, wherein State of Missouri on the relation of Jesse W. Barrett, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, and Kansas City Gas Company are appellants, and Kansas Natural Gas Company is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this 20th day of September, the year of our Lord one thousand nine hundred and twenty-two.

ARBA S. VAN VALKENBURGH,

District Judge.

Service of above Citation on Appeal acknowledged this 20th day of September A. D. 1922.

THE KANSAS NATURAL GAS COMPANY,
By RICHARD J. HIGGINS,
Its Attorney.

b [Endorsed:] In Equity. No. 361. In the District Court of the United States for the Western Division of the Western District of Missouri. State of Missouri et al., Complainants, vs. Kansas Natural Gas Company, a corporation, Defendant. Citation

on Appeal. Filed Sept. 20, 1922. Edwin R. Durham, Clerk, by H. C. Spaulding, Deputy.

1 UNITED STATES OF AMERICA, *et al.*:

Be it remembered that heretofore, to-wit, at the regular April Term of the United States District Court for the Western Division of the Western District of Missouri, and on the 29th day of April, 1922, a Bill of Complaint was filed wherein State of Missouri on the relation of Jesse W. Barrett, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, are Complainants, and Kansas Natural Gas Company is Defendant.

Said Bill of Complaint (omitting the Exhibits) is in words and figures as follows, to-wit:

2 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Bill of Complaint.

To the Honorable the Justices of the District Court of the United States for the Western Division of the Western District of Missouri:

The complainants for their cause of action against the defendant herein state the following facts, to-wit:

1. That Jesse W. Barrett is the duly elected, qualified and acting Attorney General of the State of Missouri, and a citizen and resident of said State.

2. That complainant, the Public Service Commission of Missouri, is a body politic, duly organized and existing under and by virtue of the laws of the State of Missouri and clothed with the power and impressed with the duty of regulating and controlling all public service corporations doing business in said State, and is authorized by statute to sue and be sued in its own name, and is located, established and maintained at Jefferson City in the State of Missouri and is composed of John A. Kurtz, Edwin J. Bean,

3 Noah W. Simpson, Hugh McIndoe and A. J. O'Reilly, who are the duly appointed, qualified and acting commissioners constituting said Public Service Commission, and are citi-

zens and residents of Jefferson City in said State. Complainant, the Public Service Commission, by its order heretofore duly made and entered, directed its counsel to institute and maintain this action for the purposes herein set forth.

3. That the Kansas Natural Gas Company is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of said State and is doing business in the State of Missouri and the Western Division of the Western District of said State.

4. That the jurisdiction of this court in this case rests upon the diverse citizenship of parties plaintiff and defendant and the constitutional and federal question as to whether or not the defendant is, by virtue of being engaged in interstate commerce, exempt and free from all regulation and control by the State of Missouri and the Public Service Commission of said State in the matter of furnishing, delivering and selling natural gas within the State of Missouri.

5. That the matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of Three Thousand Dollars (\$3,000.00) and this suit is of a civil nature in equity to enjoin the defendant herein from discontinuing the service and supply of natural gas to local distributing companies and through said local distributing companies to the citizens, inhabitants and the public at Kansas City, Missouri, Joplin, Missouri, Nevada, Missouri, Carl Junction, Missouri, and Oronogo, Missouri, and other communities within the State of Missouri, without the order and approval of the Public Service Commission of said State, and

4 to enjoin said defendant from changing and increasing its rates and charges without filing the same with the Public Service Commission of the State of Missouri in the manner provided by law, under a claim of right so to do under the Interstate Commerce clause of the Federal Constitution.

6. Complainants further state and show to the court that the defendant Kansas Natural Gas Company owns, leases, maintains and operates a natural gas plant and pipe line system extending from the Mid-Continent Gas Fields in Southern Kansas and Oklahoma into and through the State of Kansas and into the State of Missouri and certain municipalities thereof; and furnishes, delivers and sells natural gas within the State of Missouri to the Kansas City Gas Company at Kansas City, Missouri, the Joplin Gas Company at Joplin, Missouri, the Fort Scott and Nevada Light, Heat, Water and Power Company, at Nevada, Missouri, the Carl Junction Gas Company at Carl Junction, Missouri, the Oronogo Gas Company at Oronogo, Missouri, and other local distributing companies in other communities within said State; that said Kansas Natural Gas Company maintains a physical connection within the State of Missouri between its said plant and system and the distribution plants and systems of said local distributing companies; that said

local distributing companies own, operate, control and manage local gas plants and systems and operate the same for public use under privileges, licenses and franchises granted by the State of Missouri and by the political subdivisions and municipalities thereof in which they are doing business; that some time prior to 1906 said local distributing companies acquired, accepted and received
5 said privileges, licenses and franchises from the State of Missouri and its political subdivisions and municipalities and undertook and entered upon the business of furnishing to the inhabitants of said cities said natural gas relying upon certain contracts in writing under which said Kansas Natural Gas Company and its predecessors in title and property undertook, contracted and agreed to furnish, deliver and sell to said local distributing companies and aid local distributing companies contracted and agreed to purchase, take and receive all their needed supply of such natural gas pursuant to said licenses and franchises for the purpose of performing and discharging their public business of furnishing natural gas service to the citizens and inhabitants of said cities and the public sojourning therein; that thereupon and thereafter said Kansas Natural Gas Company and its predecessors in title and property commenced to furnish said gas to said local distributing companies and have ever since continued so to do; and that said Kansas Natural Gas Company has a complete physical monopoly of the supply of natural gas to said local distributing companies and said cities and their inhabitants within the State of Missouri; and that said Kansas Natural Gas Company is a gas corporation within the meaning of the Public Service Commission Act of the State of Missouri and owns, operates, controls and manages its said gas plant within the State of Missouri and within said cities of Kansas City Joplin, and other communities in the State of Missouri for public use under privileges, licenses and franchises granted by the State of Missouri and the political subdivisions and municipalities thereof.

6 That on September 27, 1906, the Mayor and Council of Kansas City, Missouri, passed and approved and the grantees accepted Ordinance No. 33887 granting to the predecessors in right, title and property of the Kansas City Gas Company the privilege, license and franchise to furnish natural gas to said city and its inhabitants; that section 20 of said ordinance specifically recited that the grantees covenanted that their contract for a supply of natural gas was with the Kaw Gas Company and the Kansas City Pipe Line Company, predecessors in right, title and property to the defendant Kansas Natural Gas Company; and that said grantees would procure from said corporations and file with the City Clerk within 90 days from the passage of said ordinance a written agreement in form to be approved by the City Counselor agreeing, among other things, that said two corporations, their successors and assigns the defendant herein, would continue to furnish natural gas to said city during the period of said grant and until September 27, 1936; that thereafter said written agreement was so procured from said corporations, prede-

cessors of the defendant herein, and approved by the City Counselor and so filed with the City Clerk of Kansas City, Mo.

7. That thereafter and on Nov. 17 and December 3, 1906, said predecessors in right, title and property of said Kansas Natural Gas Company and said predecessors in right, title and property of the Kansas City Gas Company, grantees of said franchise, entered into certain contracts in writing, similar in form, in which they recited the granting of said franchise by said City of Kansas City, Missouri, and under which said Kansas Natural Gas Company undertook and agreed to furnish natural gas to said Kansas City Gas Company and its predecessors for the period of said franchise; that said ordinance so granting said privileges, licenses, and franchise was attached to and made a part of said contract to furnish said supply of gas and said contract to furnish said supply of gas was referred to and agreed upon in said franchise so granting said right so to do and that said contract to furnish said supply of gas and said grant of privilege, license and franchise so to do were interdependent and mutual obligations; that pursuant to said grant of privilege, license and franchise so to do and said contract and undertaking so to do said Kansas Natural Gas Company and its predecessors did thereafter duly construct and extend their aforesaid gas plant and pipe-line system into and upon the public ways of Kansas City, Missouri, and commenced and have continued at all times thereafter to furnish, deliver and sell to the Kansas City Gas Company within the State of Missouri and within the corporate limits of Kansas City, Missouri, natural gas for public use, and that by reason thereof said Kansas Natural Gas Company is a gas corporation within the meaning of the Public Service Commission Act of the State of Missouri. True and correct copies of said franchise and agreement are hereto attached, marked Exhibits A and B, and made a part hereof. Complainants further state that substantially similar franchise-rights were granted, contracts made and conditions established and maintained by said Kansas Natural Gas Company and other local distributing companies in the cities of Joplin, Oronogo, Nevada, Carl Junction and other communities in the State of Missouri; that by reason of the foregoing facts, complainants aver that the business carried on within the State of Missouri by said Kansas Natural Gas Company consisting of furnishing, delivering and selling natural gas within the State of Missouri at Kansas City, Missouri, Joplin, Missouri, Oronogo, Missouri, Carl Junction, Missouri, and Nevada, Missouri, to local distributing gas corporations and under privileges, licenses and franchises granted or permitted by the State and its municipalities, is local in its nature and pertains to the furnishing of natural gas to local consumers within said cities and in the State of Missouri.

8. That on the 14th day of June, 1920, the Public Service Commission of Missouri, after hearing and consideration of evidence duly offered, fixed the price and rate for said gas furnished by the Kansas Natural Gas Company to the Kansas City Gas Company within the City of Kansas City and State of Missouri at

35 cents per thousand cubic feet and authorized the Kansas City Gas Company to pay such price therefor during such period of time as the selling rates then authorized by said Commission should remain in force and effect.

9. That on numerous and other proceedings and hearings before the Public Service Commission of Missouri, said Commission fixed the price for said gas so furnished by said Kansas Natural Gas Company to local distributing companies at Joplin, Nevada, Oronogo, and other communities within the State of Missouri at 28 cents per thousand cubic feet, and said Kansas Natural Gas Company has been and is now so furnishing, delivering and selling said gas to said local distributing companies within the State of Missouri at such rates so fixed by this Commission.

10. That on or about the 1st day of April, 1922, said Kansas Natural Gas Company notified the Kansas City Gas Company so obtaining its supply of gas from said Kansas Natural Gas Company that on and after April, 1922 meter-readings it would charge said company at the rate of 40 cents per thousand cubic feet for all gas furnished and delivered. A true and correct copy of said notice is hereto attached, marked Exhibit C and made a part hereof. And that on and prior to April 1, 1922, said defendant notified said other local distributing companies at Joplin, Nevada, Oronogo and Carl Junction, Missouri, in like manner that said rate would be increased from 28 cents to 35 cents per thousand cubic feet.

11. That thereupon and thereafter the Kansas City Gas Company notified said Kansas Natural Gas Company that it would accept and receive gas delivered by said defendant within the State of Missouri into the system of said local company on and after April 1922 meter-readings only upon the express understanding that said local company would pay therefor at the rate of 35 cents per thousand cubic feet until otherwise ordered and authorized by the Public Service Commission of the State of Missouri. A true and correct copy of said notice is hereto attached, marked Exhibit D, and made a part hereof.

12. That thereupon and thereafter said Kansas Natural Gas Company notified said Kansas City Gas Company that unless it agreed to accept and pay for said gas at the rate of 40 cents per thousand cubic feet on and after the 1st day of May, 1922, said defendant Kansas Natural Gas Company would discontinue the service and supply of said natural gas. A true and correct copy of said notice is hereto attached, marked Exhibit E, and made a part hereof. And complainants are informed and believe that said Kansas Natural Gas Company has issued substantially the same notices and threats, either in writing or verbally, of discontinuance of the supply of said natural gas to said local distributing companies at Joplin, Oronogo, Carl Junction and Nevada, Missouri.

10 13. That complainants are informed and believe that said Kansas Natural Gas Company will discontinue the supply of

natural gas to said local distributing companies and the citizens and inhabitants of said cities unless enjoined and restrained from so doing by the order of this Honorable Court.

14. That the defendant has not filed with the Commission in the manner provided by Sections 10477, 10478 and 10479, R. S. Mo. 1919, any new schedule of rates or any new rate or charge or any new form of contract or agreement or any new practice relating to rates, charges or service; and that no application has been made to the Commission by said defendant or other party for an order changing the rate and price heretofore authorized and allowed for said gas, and no hearing has been had and no order made allowing the aforesaid increases.

15. Complainants further state that they have not been informed and are not advised as to the reasonableness or necessity of the claim and demand of said Kansas Natural Gas Company for said increases.

16. Complainants further state and show to the court that the business carried on by the defendant of transporting natural gas from Oklahoma and Kansas into the State of Missouri is interstate commerce of a local nature; that Congress has never assumed jurisdiction over such business and that the same is subject to local regulation by the State of Missouri through its Public Service Commission.

11 17. Complainants further state and show to the Court that the daily continuous and uninterrupted furnishing, delivery and sale of said natural gas within the State of Missouri by the Kansas Natural Gas Company to the Kansas City Gas Company and other local distributing companies are local transactions within the State of Missouri and pertain to the furnishing of natural gas to local consumers within said State and municipalities thereof, and subject to the jurisdiction of the Missouri Public Service Commission.

18. Complainants further state and show to the Court that the pipe lines of the defendant Kansas Natural Gas Company are physically and permanently connected within the State of Missouri to the main system of the Kansas City Gas Company and other local public service gas corporations within said State and the transmission of gas from said pipe lines into said distribution systems is local in its nature and pertains to the furnishing of natural gas to local consumers within the State of Missouri and said cities; and is subject to the jurisdiction of the Public Service Commission of said State.

19. Complainants further aver that the defendant is conducting a business affected with the public interest; that it enjoys a complete monopoly in the furnishing of natural gas to the aforesaid cities in the State of Missouri; that its service extends to large populations and that it may not discontinue said service to any consumer, party or the public by reason of the non-payment of a controverted bill.

12 20. Complainants further state that populations of approximately one-half million people are served with natural gas by said defendant within the State of Missouri; that if said gas is shut off and the service discontinued as threatened by said defendant in the notice hereto attached, it will result in great and irreparable damage, loss, cost and expense to the people using said gas and great injury, and inconvenience to the public; that the complainants have no plain and adequate remedy at law and therefore bring this suit in this court of equity where alone full and adequate relief may be had.

Wherefore, the premises considered, complainants pray this Honorable Court:

1. That a writ of subpoena issue out of this Honorable Court directed to the Kansas Natural Gas Company as defendant herein commanding it to appear in this court on a day certain and answer the allegations of the complainants' bill of complaint and show cause, if any there be, why complainants should not have the relief herein prayed.

2. That upon final hearing this Honorable Court issue a decree herein enjoining the defendant Kansas Natural Gas Company, its officers, agents and employees from shutting off or discontinuing the service and supply of natural gas to any consumer or local distributing gas corporation obtaining gas from said defendant within the State of Missouri for the non-payment of any rate, price, charge or bill not filed, established and authorized in the manner provided by the Public Service Commission Act of the State of Missouri.

13 3. That pending the final hearing of this cause, this Honorable Court grant and issue a temporary restraining order and interlocutory injunction herein restraining the defendant, its officers, agents and employees from shutting off or discontinuing the service and supply of natural gas to any consumer or local distributing gas corporation obtaining gas from said defendant within the State of Missouri for the non-payment of any rate, price, charge or bill not filed, established and authorized in the manner provided by the Public Service Commission Act of the State of Missouri.

4. And for such other and further relief in the premises as to this Honorable Court may seem equitable and just, and for costs.

JESSE W. BARRETT,
Attorney General;

R. PERRY SPENCER,
General Counsel;

JAMES D. LINDSAY,
Assistant Counsel to Complainant
Public Service Commission,
Solicitors for Commission.

J. W. DANA,
Of Counsel.

STATE OF MISSOURI,
County of Jackson, ss:

James D. Lindsay, being first duly sworn, deposes and says that he is one of the solicitors for the complainants in the above entitled cause; that he has read and knows the contents of the foregoing bill of complaint, and that the statements, allegations and averments therein made and contained are true, except such as are made on information and belief and as to such affiant believes them to be true. And further affiant saith not.

JAMES D. LINDSAY.

Subscribed in my presence and sworn to before me this 28th day of April, 1922.

[SEAL.]

E. A. TERPENING,
Notary Public.

14 EXHIBITS TO BILL OF COMPLAINT.

Exhibit A, being Ordinance No. 33887 of Kansas City, Mo., is the same ordinance attached to the Agreement between The Kansas City Pipe Line Co. and McGowan, Small and Morgan and is set out in paragraph II of the statement of the evidence, and is omitted here.

Exhibit B, being Agreement between The Kansas City Pipe Line Co. and McGowan, Small and Morgan, dated Dec. 3, 1906, is the same Agreement set out in paragraph II of the statement of the evidence, and is omitted here.

Exhibit C, being notice dated Apr. 1, 1922, from the Kansas Natural Gas Company of increase to 40 cents, is the same notice set out in paragraph XVII of the statement of the evidence, and is omitted here.

Exhibit D, being answer of the Kansas City Gas Company, dated Apr. 20, 1922, to the above notice, is the same letter set out in paragraph XVII of the statement of the evidence, and is omitted here.

Exhibit E, being notice dated Apr. 25, 1922, from the Kansas Natural Gas Company that they will discontinue service unless paid 40 cents, is the same notice set out in paragraph XVII of the statement of the evidence, and is omitted here.

15 And afterwards, to wit, on the 4th day of May, 1922, Answer of Defendant to the Bill of Complaint was filed.
Said Answer is in words and figures as follows, to-wit:

16 In the District Court of the United States for the Western Division of the Western District of Missouri.

No. 361. Equity.

STATE OF MISSOURI, on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and The Public Service Commission of the State of Missouri, Complainants,

VS.

KANSAS NATURAL GAS COMPANY, Defendant.

Answer.

Comes now the said defendant, Kansas Natural Gas Company, and for its answer to plaintiffs' Bill of Complaint, filed herein, says:

1. It admits the allegations of Paragraph 1 of Plaintiffs' Bill of Complaint.

2. It admits the allegations of Paragraph 2 of Plaintiffs' Bill of Complaint.

3. It admits that it is a corporation, duly organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of said state, and denies that it is doing business in the State of Missouri, the Western Division of the Western District of said state.

4. It admits the allegations of fact contained in the Fourth Paragraph of plaintiffs' said Bill of Complaint.

5. Defendant admits the allegations of fact contained in the Fifth Paragraph of Plaintiffs' Bill of Complaint.

6. It admits that it owns leases, maintains and operates a natural gas plant and pipeline system extending from the Midcontinent gas field in Southern Kansas, and Oklahoma, through the State of Kansas, and into the State of Missouri and certain municipalities thereof; it denies that it sells and delivers natural gas within the State of Missouri to the Kansas City Gas Company or any of the other companies mentioned in Paragraph 6 of Plaintiffs' Bill of Complaint, and states the fact to be that it sells and transports gas from Oklahoma in interstate commerce, and delivers the same to said respective companies in the States of Missouri and Kansas; it admits that said Kansas Natural Gas Company maintains a physical connection within the State of Missouri, between its plant and system and the distribution plants and systems of said local distributing companies; and admits that said local distributing companies own, operate, control and manage local gas plants and systems, and operate the same for public use under privileges, licenses and franchises granted by the State of Missouri and by the

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public subdivisions and municipalities thereof under which they are doing business: it alleges that it has no knowledge as to whether or not said local distributing companies acquired said franchises, etc. in the year 1906, as alleged in Paragraph 6 of said Bill of Complaint; and denies that said companies undertook and entered upon the conduct of their business, relying upon any contracts in writing or otherwise with this defendant; and denies that at this time any contracts are in existence between this defendant and any of said distributing companies; it admits that for a number of years it has been furnishing gas to said local distributing companies; admits that it has a monopoly on the supply of natural gas to said companies, and denies that it is a gas corporation, within the meaning of the Public Service Commission Act of the State of Missouri; admits that it owns, operates and controls pipelines extending into the State of Missouri, and into the several communities mentioned in Paragraph 6 of said Bill of Complaint, but denies that it transacts any business in relation thereto within the State of Missouri, other than the delivery of gas transported in interstate commerce to said several distributing companies; and denies that it carries on any of its operations under any privilege, license or franchise granted by the State of Missouri or any political subdivision or municipality thereof. This defendant does not know and cannot say whether the Mayor and Council of Kansas City, Missouri, passed and approved Ordinance No. 33887, and does not know the provisions of the said ordinance, therefore denies the same, and asks that plaintiffs be put on their proof thereof.

71. Defendant admits that on November 17, and December 3, 1906, its predecessors in right, title and property, and the predecessor in right, title and property of the Kansas City Gas Company, entered into certain contracts in writing, and admits that Exhibit "A" attached to Plaintiffs' Bill of Complaint is a true and correct copy thereof, but alleges that said contract recites, among other things:

"Whereas, the party of the first part (being the Kansas City Pipe-line Co.) is the owner of gas lands and leases in the gas belt of Kansas, and a pipeline for the conveying of natural gas from the gas fields in the State of Kansas to a point at or near the city limits of Kansas City, Missouri,"

that said gas field has long since been exhausted, and that the said contract was, on the 24th day of December, 1920, by the United States District Court for the District of Kansas, declared to be no longer of any binding force or effect upon this defendant, the Kansas Natural Gas Company; and admits that it extended its pipelines to and upon the public ways of Kansas City, Missouri, and has commenced, and has continued at all times thereafter to furnish, deliver and sell to the Kansas City Gas Company gas, but alleges that such gas was transported and sold only in interstate commerce; and denies that by reason thereof the said Kansas Natural Gas Com-

pany is a gas corporation within the meaning of the Public Service Act within the State of Missouri. Defendant admits that similar contracts were made and conditions established and maintained by the said Kansas Natural Gas Company and other local distributing companies in the cities of Joplin, Oronogo, Nevada, Carl Junction and other communities in the State of Missouri, but denies that by reason of such facts that this defendant is, or has at any time carried on within the state of Missouri the business of furnishing, delivering and selling gas except in interstate commerce. Defendant does not know, and cannot say whether or not the local distributing companies operating in Joplin, Missouri, Oronogo, Missouri, Carl Junction Missouri and Nevada, Missouri, have licenses and franchises granted, or whether they or any of them are permitted by the said state and its municipalities to supply gas to said cities and towns or the inhabitants thereof, and asks that plaintiffs be put on their proof thereof.

8. Defendant denies the allegations of Paragraph 8 in Plaintiffs' Bill of Complaint.

9. Defendant denies the allegations of Paragraph 9 of Plaintiffs' Bill of Complaint.

10. Defendant admits that on or about the 1st day of April, 1922, it, the said Kansas Natural Gas Company, notified the Kansas City Gas Company that on and after the April meter readings it would charge said company at the rate of forty cents per thousand cubic feet for all gas furnished and delivered and that Exhibit "C" is a true copy of said notice, but denies that on or about April 1, 1922, it notified the other local distributing companies at Joplin, Nevada, Oronogo and Carl Junction, Missouri, that the said rate would be increased from twenty-eight cents to thirty-five cents per thousand cubic feet, but alleges the fact to be that on or about April 1, 1922, this defendant notified the distributing companies at Joplin, Oronogo and Carl Junction, Missouri, that it would charge each of said distributing companies at the rate of forty cents per thousand cubic feet for all gas furnished and delivered on and after the April, 1922 meter readings.

11. Defendant admits the allegations of Paragraph 11 of Plaintiffs' Bill of Complaint.

12. Defendant admits the allegations contained in Paragraph 12' of Plaintiffs' Bill of Complaint.

13. Defendant admits the allegations contained in the 13th Paragraph of Plaintiffs' Bill of Complaint.

14. Defendant admits the allegations contained in Paragraph 14 of Plaintiffs' Bill of Complaint.

15. Defendant denies the allegations contained in Paragraph 15 of Plaintiffs' Bill of Complaint.

16. Defendant denies the allegations contained in Paragraph 16 of Plaintiffs' Bill of Complaint.

17. Defendant denies the allegations contained in Paragraph 17 of Plaintiffs' Bill of Complaint.

18. Defendant admits that the pipelines of the Kansas Natural Gas Company are physically and permanently connected within the State of Missouri to the main system of the Kansas City Gas Company, and other local public service gas corporations within said state, but denies each and all of the other allegations contained in the 18th Paragraph of Plaintiffs' Bill of Complaint.

19. Defendant denies the allegations of Paragraph 19 of Plaintiffs' Bill of Complaint.

20. Defendant does not know, and cannot say whether the allegations of fact of Paragraph 20 of Plaintiffs' Bill of Complaint are true, and therefore denies the same, and asks that Plaintiffs be put on their proof thereof.

21. That the defendant, having traversed, denied or pleaded to each of the allegations of Plaintiffs' Bill of Complaint, further answering says: that it maintains and operates a pipeline extending from the State of Oklahoma, through the State of Kansas, and into the State of Missouri, and is engaged in transporting gas in commerce among the states of Oklahoma, Kansas and Missouri by purchasing gas produced in the states of Oklahoma and Kansas and transporting and selling the same in the states of Kansas and Missouri. That said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Missouri, and does not operate any distributing companies or sell gas to distributing companies at the respective city gates for an agreed price, and does not maintain any office or agency in the State of Missouri for the transaction of its business.

22. Said Kansas Natural Gas Company further alleges that its business as above set out constitutes commerce among the states of a national character which is not subject to regulation by the Public Service Commissions of the State of Missouri, and that it has the legal right to charge the several distributing companies to whom it delivers gas in said state such reasonable and just rates for gas delivered as it may desire without the consent of the Public Service Commission of the State of Missouri, and without making application to said Commission for authority so to do.

23. Said Kansas Natural Gas Company further alleges that the rate of forty cents per thousand cubic feet for gas delivered to the city gates of the several distributing companies set out in Plaintiffs' Petition is a just and reasonable rate, and is necessary to be charged by said Kansas Natural Gas Company in order to secure to it a reasonable return on the value of its property used and useful in connection with the service rendered, and that a less rate would be unremunerative, noncompensatory and confiscatory.

Wherefore, Defendant prays that by decree of this court it be declared to be engaged in commerce among the states of a national character, and not subject to regulations of the Public Service Commission of the State of Missouri; that the relief asked by Plaintiffs be denied; that the orders heretofore issued herein be set aside and Defendant have judgment for its costs and for such other and further relief as to this Honorable Court may seem just and right.

KANSAS NATURAL GAS COMPANY,
By ROBT. D. GARVER,
H. O. CASTER,
Its Attorneys.

STATE OF OKLAHOMA,
Washington County, ss;

H. O. Caster, of lawful age, being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled cause; that he has read and knows the contents of the foregoing answer, and that the statements and allegations herein contained are each and all true.

Further affiant saith not.

H. O. CASTER.

Subscribed and sworn to before me this 3rd day of May A. D. 1922.

[SEAL.]

MARTHA J. WILLIAMS,
Notary Public.

Commission expires March 15, 1923.

23 And afterwards, to-wit, on the 25th day of May, 1922,
Reply of Complainant to the Answer of Defendant was filed.
Said Reply is in words and figures as follows:

24 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Reply.

Now come the complainants and in reply to the 21st paragraph of the defendant's answer filed herein admit that said defendant

maintains and operates a pipe line extending from the State of Oklahoma through the State of Kansas and into the State of Missouri and is engaged in transporting gas in commerce among the States of Oklahoma, Kansas and Missouri by purchasing gas produced in States of Oklahoma and Kansas and transporting and selling the same in the States of Kansas and Missouri; deny that said Kansas Natural Gas Company does not have a franchise from any city or town in the State of Missouri but avers that said allegations are irrelevant and immaterial and allege that said company occupies the public streets and highways of said State and its municipalities and deny that said company does not operate any distributing companies or sell gas to distributing companies at the respective city gates for an agreed price; complainants have no knowledge as to whether or not said defendant maintains an office or agency in the State of Missouri for the transaction of business and therefore puts defendant to its proof.

25 In reply to the 22nd paragraph of defendant's answer, complainants deny that the business or commerce carried on by the defendant is of a national character and aver that it is subject to regulation by the State of Missouri and the Public Service Commission thereof; deny that the defendant has the legal right to charge the several distributing companies to whom it delivers gas in said State any rate it may desire without the consent of the Public Service Commission of the State of Missouri and without filing its rates and charges with said commission in the manner provided by the Public Service Commission Act of said State.

Complainants state that the allegations of paragraph 23 of said answer are immaterial and irrelevant and state no facts constituting any defense to the complainants' bill of complaint.

Wherefore, complainants ask judgment as prayed in their bill of complaint.

JESSE W. BARRETT,
Atty. General;

R. PERRY SPENCER,
General Counsel;

JAMES D. LINDSAY,

*Assistant Counsel to the Public Service Commission,
Attorneys for Complainants.*

J. W. DANA,
Of Counsel.

26 And afterwards, to-wit, on the 25th day of May, 1922, Application of the Kansas City Gas Company to be made a party complainant and to file its intervening petition was filed.

Said Application is in words and figures as follows, to-wit:

- 27 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Motion of the Kansas City Gas Company.

Now comes the Kansas City Gas Company and moves the court for leave to be made party complainant herein and to file the intervening petition hereto attached and made a part hereof.

J. W. DANA,

Attorney for Kansas City Gas Company.

- 28 And afterwards, to-wit, on the 25th day of May, 1922, an Order making the Kansas City Gas Company a party complainant and granting leave for it to file its intervening petition herein was filed and entered of record in words and figures as follows, to-wit:

- 29 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Order.

Now on this 23rd day of May, 1922, this cause came on to be heard on the application of the Kansas City Gas Company to be made a party complainant and to file an intervening petition and was argued by counsel, thereupon,

It is ordered that the Kansas City Gas Company be and the same is hereby made party complainant and granted leave to file an intervening petition herein forthwith and not to delay trial.

JOHN C. POLLOCK,
Judge.

30 And afterwards, to-wit, on the 25th day of May, 1922, the Intervening Petition of the Kansas City Gas Company was filed.

Said Intervening Petition (omitting the exhibits) is in words and figures as follows, to-wit:

31 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

VS.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Intervening Bill of Complaint of the Kansas City Gas Company.

To the Honorable the Justices of the District Court of the United States for the Western Division of the Western District of Missouri:

Now comes the Kansas City Gas Company, hereinafter the Company, and with leave of court files this its intervening bill of complaint herein and represents and states the following facts to-wit:

1. That it hereby adopts the statements, allegations and averments of the complainants' bill of complaint, together with the exhibits thereto attached and makes the same a part hereof as fully as if written at full length herein, and joins with the complainants in their prayer for the relief demanded, as will hereinafter more fully appear.

2. That this Company is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri and engaged in the business of furnishing, distributing and selling natural gas to the city of Kansas City, Missouri, and the inhabitants thereof, as alleged in the complainants' petition.

32 3. That this Company has an interest in the subject of the action set forth in the complainants' bill of complaint and the relief demanded and that the judgment and decree of this court

herein cannot issue in favor of either the complainants or defendant without materially affecting or prejudicing the rights and interests of this Company, as will hereinafter more fully appear.

4. This Company further states and shows to the court that the defendant owns, leases, maintains and operates a natural gas plant and pipeline system extending from the Oklahoma and Kansas gas fields into and through the state of Kansas and into the state of Missouri and furnishes, delivers and sells natural gas within the state of Missouri to this Company and numerous other companies doing business in various cities, towns and communities in said state; that said defendant maintains permanent physical connections within the state of Missouri between its said plant and system and the plant and system of this Company and other local distributing companies; that said defendant occupies the public highways of the state of Missouri and its municipalities with its said pipelines and is vested with and exercises the power of eminent domain for the purpose of acquiring rights of way for the laying and maintenance of its said pipelines and system; that this Company owns, maintains and operates a gas plant and system in Kansas City, Missouri, and furnishes natural gas under Ordinance No. 33887 of Kansas City, Missouri, duly granting authority so to do to this Company and its predecessors in right, title and property; that on and prior to November, 1906, this Company manufactured, furnished and sold manufactured gas to said city and its inhabitants and that on or about said date this Company discontinued the furnishing of manufactured gas and undertook and entered upon the business of furnishing natural gas to said city and its inhabitants relying upon certain contracts in writing dated Nov. 17 and December 3, 1906, under which said Kansas Natural Gas Company and its predecessors in title and property undertook, contracted and agreed to furnish, deliver and sell to this Company and its predecessors, and this Company and its predecessors contracted and agreed to purchase, take and receive natural gas from said Kansas Natural Gas Company and its predecessors pursuant to said ordinance for the purpose of performing and discharging their public business of furnishing natural gas service to said city and its inhabitants; that thereupon and thereafter said Kansas Natural Gas Company and its predecessors in title and property commenced to furnish said natural gas to this Company and said defendant and its receivers have ever since continued so to do; and that said defendant has a complete physical monopoly of the supply of natural gas to this Company and the city and people served by it; true and correct copies of said Ordinance No. 33887 of Kansas City, Missouri, and said gas-supply-contract dated December 3, 1906, are attached to the complainants' bill of complaint, hereby referred to and made a part hereof.

5. That on and prior to January 20, 1920, the defendant and its receiver by authority of court demanded of this Company 35 cents per thousand cubic feet for gas furnished by said defendant to this Company, delivered at Kansas City, Missouri, that thereupon this Company, relying upon said offer of said defendant to furnish said

gas at 35 cents per thousand feet, applied to the Public Service Commission of Missouri for authority to pay said 35 cents city gates rate and to charge its customers 80 cents per thousand feet with a 50-cent per month service-charge, which said rate was necessary in order to pay said 35 cent city gates rate; and that thereupon

34 and thereafter the Commission, relying upon said demand and offer of said defendant entered an order fixing said 35 cent city gates rate to said Kansas Natural Gas Company and said 80 cent rate and 50-cent service-charge; a true and correct copy of said order being hereto attached, marked Exhibit A, and made part hereof.

6. That on April 1, 1922, said defendant notified this Company that on and after April 1922 meter-readings it would charge this Company at the rate of 40 cents per thousand cubic feet for all gas furnished; a true and correct copy of said notice being attached to the complainants' bill of complaint, hereby referred to and made a part hereof.

7. That thereupon this Company notified said defendant that it would accept and receive gas delivered by said defendant into the main system of this Company on and after April, 1922, meter-readings only upon the express understanding that this Company would pay therefor at the rate of 35 cents per thousand cubic feet until otherwise ordered and authorized by the Public Service Commission of Missouri; a true and correct copy of said notice being attached to the complainants' bill of complaint, hereby referred to and made a part hereof.

8. That thereupon said defendant notified this Company that unless it agreed to accept and pay for said gas at the rate of 40 cents per thousand cubic feet on and after May 1, 1922, said defendant would discontinue the service and supply of said natural gas; a true and correct copy being attached to the complainants' bill of complaint, hereby referred to and made a part hereof.

35 9. This Company further states and shows to the court that it is not now earning a fair return upon its property used and useful in the service of the public and that it is unable to and therefore has not paid or agreed to pay and refuses to pay or agree to pay said defendant said increase from 35 cents to 40 cents per thousand feet until authorized so to do by the Public Service Commission and further authorized to increase its selling rates to its consumers from 80 cents to 85 cents per thousand feet with a 50-cent per month service-charge to enable it to pay said increase in the city gates rate; this Company is informed and believes that if a decree of injunction issues herein said defendant will appeal to the Supreme Court of the United States from said decision by this court, and that if a decree of injunction is denied herein the complainants will appeal to the Supreme Court of the United States for the purpose of determining the jurisdiction of the Commission over the defendant; and this Company states that the prosecution and determination of said appeal will

take at least two years' time; and this Company is informed and believes that if the jurisdiction of said Commission is not sustained then and in that event said defendant will assert a claim and demand against this Company for five cents per thousand cubic feet balance on account for all gas furnished from April 25, 1922, until the final determination of said matter; and that said claim will amount to approximately \$500,000.00.

36 10. This Company further states and shows to the court that it is entitled to a full and fair return upon its property used and useful in the service of the public pending the process of rate-making and pending the final adjudication and determination of the jurisdiction of said Commission over said Kansas Natural Gas Company; that if said jurisdiction is not sustained and said Kansas Natural Gas Company collects said five cents increase from this Company pending said litigation, its present rates are and will be unreasonably low, non-compensatory and confiscatory of the property of this Company used and useful in the service of the public during all of said time in violation of the due process clause of the Federal Constitution.

11. That by reason of the foregoing facts this Company has filed with the plaintiff Public Service Commission of Missouri a new schedule and application for authority to increase its selling rate for gas from 80 cents to 85 cents per thousand cubic feet pending the final determination of the jurisdiction of said Commission and offers to collect said five cents per thousand cubic feet and to hold the same in a reserve fund and to account for and return the same to each and every consumer in the amounts paid by the said consumer if and when it shall be finally determined that the demands of said Kansas Natural Gas Company upon this Company for said increase from 35 cents to 40 cents per thousand cubic feet were and are wrongful, unlawful and non-enforceable against this Company.

12. That if this court denies the decree prayed by complainants herein, then complainants will appeal to the Supreme Court of the United States to determine the jurisdiction of said Commission, and pending such appeal said defendant will discontinue the supply of natural gas or this Company will be forced to pay said additional five cents per thousand feet; and its present rates fixed

37 by said Commission during said appeal would be confiscatory.

That the claim of right of defendant herein to determine for itself the rate it shall charge for natural gas furnished to this Company and complainants' denial of that claim, involve the construction and application of Sec. 8 of Art. 10 of the Constitution of the United States providing that Congress shall have power to regulate commerce among the several states; and the claim of this Company for compensatory rates pending the adjudication of said matter and the further process of rate-making by said Commission involves the construction and application of Sec. 1, Art. 14 of the Amendments to said Constitution providing that no state shall deprive any person of property without due process of law.

13. That this Company here now in open court offers, if allowed and permitted so to do, to charge and collect said five cents per thousand feet and to hold the same in a special fund and account, and upon the final determination of the jurisdiction of said Commission and the rights of the parties to refund the same to the consumers or to pay said amount over to the defendant herein, as ordered and directed by this Honorable Court or the Public Service Commission of the State of Missouri.

14. This Company further avers that great and irreparable loss, damage, cost and expense will be sustained by this Company and its customers if the defendant herein carries out its threat to discontinue the supply of gas to this Company and its customers; and great and irreparable damage, loss, cost and expense will or may be sustained by this Company either if the decree prayed herein is granted or denied and this Company has no plain, adequate or proper remedy at law; wherefore this intervening bill of complaint is filed in this cause before this Honorable Court where alone full and adequate relief can be had.

38 Wherefore, the premises considered, this Company prays this Honorable Court that the decree of injunction prayed in the complainants' bill of complaint be granted, but upon the condition that the Public Service Commission of the state of Missouri forthwith authorize this Company to increase its selling rates to its consumers from 80 cents to 85 cents per thousand feet and to hold said increase in a reserve account and fund and to return the same to the consumers paying said increase if and when it shall be finally determined that the demand of said defendant Kansas Natural Gas Company upon the Kansas City Gas Company for said increase in the city gates rate from 35 cents to 40 cents per thousand cubic feet was wrongful, unlawful and non-enforceable against the Kansas City Gas Company.

J. W. DANA,
Attorney for the Kansas City Gas Co.

STATE OF MISSOURI,
County of Jackson, ss:

C. W. Green, being first duly sworn, deposes and says that he is the Vice President and General Manager of the Kansas City Gas Company; that he has read and knows the contents of the foregoing intervening bill of complaint, and that the statements, allegations and averments therein made and contained are true, except such as are made on information and belief and as to them affiant believes them to be true. And further affiant saith not.

C. W. GREEN.

Subscribed in my presence and sworn to before me this 20th day of May, 1922.

[SEAL]

E. A. TERPENING,
Notary Public.

My commission expires Oct. 23, 1922.

21

39 EXHIBIT TO INTERVENING BILL OF COMPLAINT.

Exhibit A, being order of Pub. Serv. Com. of Missouri, is the same order set out in paragraph XI of the statement of the evidence, and is omitted here.

40 And afterwards, to-wit, on the 2nd day of June, 1922, the Answer of the Defendant to the Intervening Petition of the Kansas City Gas Company was filed.

Said Answer is in words and figures as follows, to-wit:

41 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of Jesse W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Answer of Defendant to Bill of Kansas City Gas Co.

Filed June 2, 1922.

Kansas Natural Gas Company, (defendant) for answer to the intervening bill of complaint of Kansas City Gas Company, filed herein on May 25th, 1922, respectfully states:

1. Defendant adopts its answer to the complainant's bill of complaint, together with all exhibits thereto attached, and makes the same a part hereof, as fully as though the same were repeated at length herein.

2. Defendant admits that the Kansas City Gas Company is a corporation duly organized and existing under and by virtue of the laws of Missouri, and that said Kansas City Gas Company is engaged in the business of furnishing and distributing natural gas to the City of Kansas City, Missouri, and the inhabitants thereof.

42 3. Defendant admits that Kansas City Gas Company has an interest in the subject of the action set forth in complainant's bill of complaint, but defendant is not informed as to whether the relief demanded and any judgment or decree that may be entered therein, will materially affect or prejudice the rights and interests of Kansas City Gas Company.

4. Defendant admits that it owns, leases, maintains and operates a pipe line system and plant for the transportation and sale of natural gas; said pipe line and system extends from Oklahoma in and through the State of Kansas and into the State of Missouri. Defendant transports all of its gas which is sold in the States of Kansas and Missouri in inter-state commerce, and all of the gas sold by the defendant to the Kansas City Gas Company is gas that has been transported in and is a part of inter-state commerce. Defendant is engaged in like interstate commerce in the transportation and sale of gas to all other companies doing business in various cities, towns and communities, both in the States of Missouri and Kansas. Defendant admits that it maintains permanent physical connections within the State of Missouri, between its plant and system and the plant and system of the Kansas City Gas Company. Defendant admits that in places its lines occupy public highways of the State of Missouri. Defendant is without knowledge as to whether it is vested with the power of eminent domain under the laws of the State of Missouri, and whether it is or is not vested with the power of eminent domain, is a question of law. Defendant denies that it has ever exercised the power of eminent domain for any purpose in the State of Missouri. Defendant admits that Kansas City Gas Company operates a gas plant and system in Kansas City, Missouri, and that it furnishes natural gas to the City of Kansas City, Missouri, and the inhabitants thereof. Defendant is without

43 knowledge as to the basic power or authority of Kansas City Gas Company to operate said gas plant, or as to whether said Kansas City Gas Company is operating under the provisions of Ordinance #33887 of Kansas City, Missouri. Defendant is without knowledge as to the Kansas City Gas Company prior to November, 1916, manufacturing, furnishing and selling manufactured gas to said City and its inhabitants; or as to any discontinuance thereof on or about said day. Defendant is without knowledge as to whether Kansas City Gas Company discontinued the sale of Natural gas because of any reliance upon any contracts dated November 17 and December 3, 1906. Copies of said contracts are attached to the bill of complaint, and speak for themselves as to their terms and conditions. Defendant admits that after December 3, 1906, it commenced to transport, sell and deliver to the Kansas City Gas Company, natural gas. Defendant denies that it has a complete physical monopoly of the supply of natural gas to the Kansas City Gas Company.

5. Defendant admits that on January 20, 1920, Receivers of its property under and by virtue of an order of court, demanded of the Kansas City Gas Company 35 cents per thousand cubic feet, for all gas delivered by defendant to Kansas City Gas Company. Defendant denies that it or its Receivers offered to furnish to Kansas City Gas Company, gas at 35 cents per thousand cubic feet. The application of the Kansas City Gas Company to the Public Service Commission of Missouri, speaks for itself as to its terms and its prayer. Therefore, defendant denies that said application of the

Kansas City Gas Company to the Public Service Commission of Missouri, was for authority to pay 35 cents city gate rate to defendant, and to charge its customers with 80 cents per thousand cubic feet, with a 50 cents per month service charge. Defendant denies
44 that the Commission in entering any order, relied upon any offer of defendant or its Receivers that defendant or its Receivers would furnish gas at the rate of 35 cents per thousand cubic feet. Defendant admits that the Public Service Commission of Missouri, made and entered an order upon said application, a copy of which is attached to the intervening petition, marked Exhibit "A".

6. Defendant admits that on April 1st, 1922, it notified Kansas City Gas Company, in writing, as to the price that would be charged by defendant for natural gas after the April meter readings. A copy of said notice is attached to complainant's bill of complaint.

7. Defendant admits that after service by it of the notice referred to in paragraph numbered Six hereof, the Kansas City Gas Company sent to defendant a notice, a copy of which is attached to the bill of complaint.

8. Defendant admits that after its receipt of the notice of the Kansas City Gas Company referred to in paragraph numbered Seven hereof, it sent to the Kansas City Gas Company a notice with reference to the discontinuance of service and supply, a copy of which notice is attached to the bill of complaint.

9. Defendant is without knowledge as to whether the Kansas City Gas Company is now earning a fair return upon its property used and useful in the service of the public, or as to whether said Kansas City Gas Company is unable to, and for such reason has refused to pay or agree to pay defendant for gas at the rate provided in said notice of April 1st, 1922, until authorized to do so by the Public Service Commission, and until it is further authorized to increase its selling rates to its consumers from 80 cents to 85 cents per thousand cubic feet with a 50 cents per month service charge.

45 Defendant's intention is that if a decree of injunction issue herein, to appeal from said decision to whatever appellate court has jurisdiction to hear and determine such appeal. Defendant is not informed as to what the plan, purpose or intention of the complainant may be in event that an injunction herein is denied. Defendant is not informed as to the time that will elapse during the prosecution and determination of any such appeal. Defendant now claims, and will forever claim, that on and since April 25, 1922, until the price is further changed, that the Kansas City Gas Company shall pay for all natural gas furnished to it at Kansas City by defendant at the rate of 40 cents per thousand cubic feet on the terms stated in its notice of April 1st, 1922.

10. Defendant denies that the Public Service Commission has any jurisdiction, power or authority to fix, prescribe or limit the rates to be charged by the defendant to the Kansas City Gas Com-

pany. Defendant is without knowledge as to whether if it collects the rates prescribed in its notice of April 1st, 1922, such collection will result in losses to the Kansas City Gas Company, or will render the present rates charged by the Kansas City Gas Company unreasonably low, non-compensatory or confiscatory of the property of the Kansas City Gas Company, used or useful in the service of the public.

11. Defendant is without knowledge as to the reasons why said Kansas City Gas Company has filed with the complainant, Public Service Commission of Missouri, a new schedule or application for authority to increase its selling rates for gas from 80 cents to 85 cents per thousand cubic feet, if any such schedule has been filed. It is without knowledge as to any change in the schedule proposed by the Kansas City Gas Company.

46 12. Defendant is without knowledge as to whether complainant will appeal to the Supreme Court of the United States or to any other court of appellate jurisdiction to determine the jurisdiction of the Public Service Commission in the event that this Court denies the decree prayed for by the complainant herein. Defendant admits that in the event of such a decree being entered, it will discontinue the supply of natural gas unless said Kansas City Gas Company will pay the rates provided for in its notice of April 1, 1922. Defendant is without knowledge as to whether in that event the rates being collected by the Kansas City Gas Company will be confiscatory.

Wherefore, the defendant prays that the intervening bill of the Kansas City Gas Company be dismissed, and that the defendant may have such other and further orders as may be proper in equity in the premises.

(Signed)

ROBT. D. GARVER,
R. J. HIGGINS,
H. O. CASTER,

Attorneys for Kansas Natural Gas Company.

47 And afterwards, to-wit, on the 27th day of June, 1922, Final Decree was filed and entered of record in words and figures as follows, to-wit:

- 48 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, Complainants; Kansas City Gas Company, Complainant and Intervenor,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Final Decree.

Filed June 27, 1922.

This cause, having come on to be finally heard on the 26th day of June, 1922, upon the pleadings and proofs, the complainants appearing by Mr. J. D. Lindsay, their attorney; the Kansas City Gas Company, intervenor, appearing by Mr. J. W. Dena, its attorney, and the defendant, the Kansas Natural Gas Company appearing by H. O. Caster, R. D. Garver and R. J. Higgins, its attorneys; and the Court having taken said cause under advisement and having duly considered the pleadings and proofs and the arguments of counsel, doth now, upon this 27th day of June, 1922:

1. Order, adjudge and decree that the said bill of complaint and intervening bill of complaint of the Kansas City Gas Company herein be, and the same hereby are dismissed, and the restraining order heretofore issued be and the same is set aside, with costs to complainants and intervenor, the Kansas City Gas Company.

49 2. It appearing from the record that the increase in the city gates rate for gas from 35 cents to 40 cents per thousand cubic feet charged by the Kansas Natural Gas Company to the Kansas City Gas Company will result in a material increase in the operating costs of said Kansas City Gas Company and may require a change in the rates charged by said Company to its consumers; and it further appearing that said Kansas City Gas Company has filed with the Public Service Commission of Missouri a new schedule of rates and an application for authority to increase its selling rate for gas from 80 cents to 85 cents per thousand cubic feet if, when and as said Kansas Natural Gas Company shall increase its rates to said Kansas City Gas Company to 40 cents per thousand feet for gas: Wherefore, it is ordered that said Kansas City Gas Company be and it is hereby authorized to increase its selling rate for gas furnished to its consumers from 80 cents to 85

cents per thousand cubic feet effective on bills rendered from and after the date hereof; and said Company is hereby ordered to deposit said increase monthly with the Clerk of this Court as Auditor, hereby appointed to hold the same, and said Company shall keep an account of all amounts charged in excess of the existing schedule of rates authorized by the Public Service Commission of Missouri, together with the names of the persons, corporations and firms so charged, and shall, if and when ordered by the Court so to do, file with the Court a statement of the aggregate amount of such excess charge together with the list of parties charged as aforesaid; and shall file bond in the sum of \$20,000.00 conditioned that it will observe this order. If at any time the amount thus sequestered becomes oppressively large, the Company may apply to the Court, upon due notice to the Commission, for permission to withdraw from the Clerk, so appointed as Auditor to hold the same, any part of the amount thus sequestered; and if the Court shall be

49a of the opinion that said application should be granted, in whole or in part, it may order the same, in whole or in part, released to the Company upon the giving of a good and sufficient bond for the return to the Clerk of the amount so released if and when the Court shall order such return to be made. The sums so deposited shall be held subject to the disposition of the Court upon any final order or decree in accordance with the determination of the rights of all parties interested.

3. And the Public Service Commission of Missouri is hereby temporarily restrained from interfering with said Kansas City Gas Company putting into force and effect and collecting said 85 cents per thousand cubic feet for gas furnished pending the hearing and determination by said Commission of the application of said Company for an increase in its selling rates, and until the further order of this Court, and the court hereby retains jurisdiction of the Kansas City Gas Company and the Public Service Commission of Missouri for the purposes herein set forth.

ARBA S. VAN VALKENBURGH,

Judge.

50 And afterwards, to-wit, on the 20th day of September, 1922, Petition for Appeal, Assignment of Errors, Notice of presentation of Petition for Appeal and Order Allowing Appeal were filed.

Said Petition for Appeal, Assignment of Errors, Notice and Order Allowing Appeal are in words and figures as follows:

51 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commis-
sion of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

*Petition of the State of Missouri and the Public Service Commission
of Missouri and the Kansas City Gas Company for an Appeal.*

Filed 9-20-22.

The above named State of Missouri, Public Service Commission
of Missouri and Kansas City Gas Company conceiving themselves
aggrieved by the final judgment and decree entered herein on this
27th day of June, 1922, in the above entitled proceeding, do hereby
appeal from said judgment and decree to the Supreme Court of the
United States; and they pray that this appeal may be allowed and
that the transcript of the record and proceedings and papers upon
which said judgment and decree was made, duly authenticated, may
be sent to the Supreme Court of the United States.

JESSE W. BARRETT,
Attorney General of Missouri;

L. H. BREUER,

R. PERRY SPENCER,

JAMES D. LINDSAY,

Solicitors for Public Service

Commission of Missouri.

J. W. DANA,

Solicitor for Kansas City Gas Company.

Copy of above petition received this 19th day of September, 1922.

THE KANSAS NATURAL GAS CO.,

By H. O. CASTER,

R. D. GARVER,

R. J. HIGGINS,

Its Attorneys.

Kansas City, Mo.

52 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri and Kansas City Gas Company, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Assignment of Errors on Appeal.

Filed 9-20-22.

Now come the Complainants and assign the following errors in the above entitled cause, to-wit:

Assignment No. 1. That the court erred in holding that the furnishing, delivery and sale of natural gas locally at Kansas City, Missouri, either within or without the State of Missouri by the Kansas Natural Gas Company to the Kansas City Gas Company is interstate commerce, national in character and free from regulation by the State of Missouri through its Public Service Commission.

Assignment No. 2. That the court erred in denying the injunction prayed in the bill of complaint and intervening bill of complaint.

53 Assignment No. 3. That the court erred in dismissing the bill of complaint and intervening bill of complaint.

JESSE W. BARRETT,
Attorney General of Missouri;

R. PERRY SPENCER,

JAMES D. LINDSAY,

Solicitor for Public Service

Commission of Missouri.

J. W. DANA,

Solicitor for Kansas City Gas Company.

Copy of above Received 19- day of September, 1922.

THE KANSAS NATURAL GAS CO.,
By H. O. CASTER,
R. D. GARVER,
R. J. HIGGINS,

Its Attorneys.

Kansas City, Mo.

54 In the District Court of the United States for the Western
District of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commis-
sion of the State of Missouri and Kansas City Gas Company, Com-
plainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Notice.

Filed 9-20-22.

To the Kansas Natural Gas Company and its Attorneys of Record:

You and each of you will please take notice that the State of Mis-
souri, the Public Service Commission of the State of Missouri, and the
Kansas City Gas Company will call up for hearing and order their
petition for the allowance of an appeal from the final order, judg-
ment and decree in the above entitled case to the Supreme Court of
the United States on September 20, 1922, at ten o'clock A. M., or as
soon thereafter as counsel can be heard, in the courtroom of the
United States District Court for the Western District of Missouri, at
St. Joseph, Missouri.

(Signed)

JESSE W. BARRETT,
Attorney-General of Missouri;

(Signed)

L. H. BREUER,

(Signed)

JAMES D. LINDSAY,

*Solicitor for Public Service
Commission of Missouri.*

(Signed)

J. W. DANA,
Solicitor for Kansas City Gas Company.

Above notice received.

THE KANSAS NATURAL GAS COMPANY,
By H. O. CASTER,
R. D. GARVER,
R. J. HIGGINS,
Its Attorneys.

Kansas City, Mo., September 19, 1922.

55 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commis-
sion of the State of Missouri and Kansas City Gas Company Com-
plainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Order Allowing Appeal.

Filed 9-20-22.

This cause came on to be further heard on this 20th day of Sep-
tember, 1922, upon notice, and upon the petition of the complain-
ants for an appeal, and was argued by counsel, and it is ordered

That the appeal of the State of Missouri, Public Service Commis-
sion of Missouri and the Kansas City Gas Company from the final
judgment and decree entered herein on the 27th day of June, 1922,
be and the same is hereby allowed; that their bond on appeal be and
is hereby fixed in the sum of \$500.00, to be approved by the Clerk.

ARBA S. VAN VALKENBURGH,
District Judge.

September 20, 1922.

56 And afterwards, to-wit, on the 23rd day of September,
1922, Appeal Bond was filed and approved.

Said Appeal Bond is in words and figures as follows, to-wit:

57 In the District Court of the United States For the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri and Kansas City Gas Company, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Appeal Bond.

Filed 9-23-22.

Bond of State of Missouri, Public Service Commission of the State of Missouri, and Kansas City Gas Company.

Know all men by these presents: That State of Missouri Public Service Commission of the State of Missouri, and Kansas City Gas Company and the American Surety Company of New York are held and firmly bound unto Kansas Natural Gas Company in the full and just sum of Five Hundred Dollars (\$500.00) to be paid to said Kansas Natural Gas Company, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 20 day of September, 1922.

Whereas, lately and on the 27th day of June, 1922, in the District Court of the United States for the Western Division of the Western District of Missouri, in a suit pending in said court between State of Missouri on the relation of Jesse W. Barrett, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, complainants, and Kansas City Gas Company intervenor and complainant, vs. Kansas Natural Gas Company, a corporation, defendant, judgment was rendered against the complainants, and the complainants State of Missouri, Public Service Commission of the State of Missouri and Kansas City Gas Company have obtained an order of said court allowing an appeal from the decision of said court to reverse the judgment in the aforesaid suit, and a citation directed to said Kansas Natural Gas Company citing and admonishing them to be and appear in the Supreme Court of the United States at the City of Washington thirty days from and after the date of said citation.

58 Now the condition of the above obligation is such, that if the said State of Missouri, Public Service Commission of the State of Missouri, and Kansas City Gas Company shall prosecute said

appeal to effect, and answer all costs if they fail to make good their appeal, then the above obligation to be void, else to remain in full force and effect.

Signed and sealed by

STATE OF MISSOURI,

By JESSE W. BARRETT, *Atty. Genl.*,

By M. E. OTIS, *Asst. Atty. Genl.*,

[SEAL.]

PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI,

By JNO. A. KURTZ, *Chairman*,

By JAS. PAINTER, *Secretary*.

[SEAL.]

KANSAS CITY GAS COMPANY,

By C. W. GREEN, *Vice President*.

[SEAL.]

AMERICAN SURETY COMPANY OF
NEW YORK,

By A. I. ZIMMERMAN, *Res. Vice Pres.*

Attest:

W. R. EVANS,

Res. Asst. Sec.

The foregoing bond and surety thereon is approved.

EDWIN R. DURHAM,

Clerk.

59 And afterwards, to-wit, on the 14th day of October, 1922,
an Order extending the time for filing Transcript was filed
and entered of record in words and figures as follows:

60 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commis-
sion of the State of Missouri and Kansas City Gas Company, Com-
plainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

Order.

Filed 10—22.

This cause came on for further hearing on the application of ap-
pellants from the order entered herein on September 20, 1922, for
an order enlarging the time for filing their records with the Clerk
of the Supreme Court, and upon consideration thereof:

It is ordered, That the appellants do have and are hereby given an extension of time to and including the 21st day of November, 1922, to docket their case and file their record thereof with the Clerk of the Supreme Court of the United States.

ARBA S. VAN VALKENBURGH,
Judge.

Dated October 14, 1922.

61 And afterwards, to-wit, on the 28th day of October, 1922,
Notice of lodging Statement of Evidence with Clerk and of
filing Præcipe for Transcript was filed.

Said Notice is in words and figures as follows, to-wit:

62 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI, on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Commis-
sion of the State of Missouri and Kansas City Gas Company, Com-
plainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant; KAN-
SAS CITY GAS COMPANY, Intervenor.

Notice.

Filed 10-28-22.

To the Kansas Natural Gas Company and H. O. Caster, R. D. Gar-
ver, and Richard J. Higgins, its attorneys of record, Greetings:

You will please take notice that the appellants have lodged their
statement of the evidence in the office of the Clerk of the above en-
titled court for your examination and have filed their præcipe for
the transcript of the record on appeal; and that they will on the 8th
day of November, 1922, at ten o'clock A. M., or as soon thereafter
as convenient to the court, at the courtroom of the United States
District Court for the Western Division of the Western District of
Missouri apply to the court or a judge thereof to approve said state-
ment of the evidence and settle said record on appeal to the Supreme
Court of the United States. JESSE W. BARRETT,

Attorney-General of the State of Missouri;

L. H. BREUER,

JAMES D. LINDSAY,

Solicitors for the Public Service Commission of Missouri.

J. W. DANA,

Solicitor for Kansas City Gas Co.

Service of the foregoing notice and receipt of copy of the præcipe are acknowledged and accepted this 28th day of October, 1922.

H. O. CASTER,
R. D. GARVER,
R. J. HIGGINS,

Solicitors for Kansas Natural Gas Co.

63 And afterwards, to-wit, on the 28th day of October, 1922, Præcipe for Transcript was filed.

Said Præcipe for Transcript is in words and figures as follows, to-wit:

64 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI, on the Relation of JESSE W. BARRETT, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri and Kansas City Gas Company, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant; KANSAS CITY GAS COMPANY, Intervenor.

Præcipe for Transcript of Record.

Filed 10-28-22.

To the Clerk:

You will please prepare the transcript of the record in the above entitled case to be filed in the office of the clerk of the Supreme Court of the United States under and pursuant to the appeal heretofore taken to said court in this case by the State of Missouri, on relation of Jesse W. Barrett, Attorney-General of the State of Missouri, and the Public Service Commission of the State of Missouri, and Kansas City Gas Company; and you will please include in said transcript of the record the following pleadings, proceedings, evidence and papers on file in your office, to wit:

1. Bill of complaint, omitting all exhibits.
2. Answer of Kansas Natural Gas Company to the bill of complaint.
3. Reply of State of Missouri and Public Service Commission of Missouri to answer of Kansas Natural Gas Company.
- 65 4. Motion of Kansas City Gas Company to be made a party.

5. Order making Kansas City Gas Company a party complainant and allowing same to intervene.

6. Intervening bill of complaint of Kansas City Gas Company, omitting all exhibits.

7. Answer of defendant to bill of Kansas City Gas Company.

7½. Stipulation for statement of the evidence.

8. Statement of the evidence, including all exhibits.

9. Decree.

10. Assignment of errors.

11. Notice of appeal.

12. Application for appeal.

13. Order allowing appeal.

14. Appeal bond.

15. Citation.

16. Order extending time to docket case and file record.

17. Præcipe.

18. Notice of lodgment of statement of the evidence and filing of præcipe.

19. Order of court approving the statement of the evidence.

66 The intent and purpose hereof being to avoid all duplication of any matter attached to any pleading introduced or embraced in the statement of the evidence; said transcript to be prepared as required by law and the rules of this court and the Supreme Court of the United States and transmitted to the office of the clerk of the Supreme Court of the United States pursuant to the citation issued herein and lodged with the clerk of the Supreme Court of the United States on or before the 21st day of November, 1922.

JESSE W. BARRETT,

Attorney-General of the State of Missouri.

JAMES D. LINDSAY,

Solicitor for Public Service

Commission of State of Missouri.

J. W. DANA,

Solicitor for Kansas City Gas Company.

67 And afterwards, to wit, on the 14th day of November, 1922, a Stipulation relative to the Statement of Evidence, and the Statement of Evidence were filed.

Said Stipulation and Statement of Evidence are in words and figures as follows, to wit:

68 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI, on the Relation of JESSE W. BARRET-, Attorney
General of the State of Missouri, and the Public Service Com-
mission of the State of Missouri and Kansas City Gas Company,
Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant, KANSAS
CITY GAS COMPANY, Intervenor.

Stipulation.

Filed 11-14-22.

It is stipulated and agreed That the statement of the evidence
heretofore filed by the complainants and the statement of objections
and amendments proposed by defendant to said statement of the evi-
dence, heretofore filed by the defendant, may be withdrawn and
that in lieu thereof the attached statement of the evidence prepared
by complainants in conformity to defendant's objections may be
filed; and that the defendant will present no objections to said state-
ment of the evidence and the same may be approved by the court.

J. W. DANA,

Counsel for Complainants.

R. J. HIGGINS,

Counsel for Defendant.

69 In the District Court of the United States for the Western
Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI, on the Relation of JESSE W. BARRETT, Attorney
General of the State of Missouri, and the Public Service Com-
mission of the State of Missouri and Kansas City Gas Company,
Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant, KANSAS
CITY GAS COMPANY, Intervenor.

70

Statement of the Evidence.

Now come the appellants and file this their statement of the evi-
dence and request the Clerk to include the same in the record on ap-
peal of the above entitled case to the Supreme Court of the United
States.

On June 26, 1922, the issues arising upon the bill of complaint, the answer thereto and the reply to said answer, the intervening bill of complaint of the Kansas City Gas Company and the answer of the defendant Kansas Natural Gas Company to said intervening bill of complaint of the Kansas City Gas Company, came on for final hearing. All of the evidence hereinafter set forth is evidence introduced by the complainants and the intervenor. No evidence was introduced by the defendant Kansas Natural Gas Company. The evidence so introduced by the complainants and the intervenor is as follows:

I.

By stipulation the following facts were agreed to:

(1) That the Kansas Natural Gas Company is in the control of and now operates all of the properties owned by the Kansas City Pipe Line Company, the Kaw Gas Company and Kansas Natural Gas, Oil, Pipe Line and Improvement Company, under private arrangements between said companies and the Kansas Natural Gas Company; that the contract attached to the bill of complaint as Exhibit B was, after its execution, assigned by McGowan, Small and Morgan to the Kansas City Gas Company and by the Kansas City Pipe Line Company to the Kansas Natural Gas Company.

71 (2) That during the year 1906, the Kansas City Gas Company or its predecessors commenced to furnish and sell natural gas to Kansas City, Missouri, and its inhabitants under the terms and provisions of Ordinance No. 33887 of said city, and that Exhibit A to the bill of complaint is a true copy of said ordinance.

(3) That from 1906 to October 12, 1912, the Kansas Natural Gas Company furnished gas to the Kansas City Gas Company and the latter accepted, received and paid for the same under and in conformity with the terms and provisions of said contract, Exhibit B to the bill of complaint.

(4) That from October 12, 1912, to August 13, 1917, the Kansas Natural Gas Company was operated by receivers appointed by this court, and by receivers appointed by the District Court of Montgomery County, Kansas, and said receivers took over the company's property, affairs and business and operated them under orders of the respective courts without specifically adopting said contract (Exhibit B) which was subject to rejection by the court; but continued to deliver gas to the Kansas City Gas Company and accepted payments therefor at the rates provided for in said contract.

(5) That from August 13, 1917, to January 1, 1921, the receivers of the Kansas Natural Gas Company furnished gas to the Kansas City Gas Company and other local distributing companies, under and pursuant to certain administrative orders of the United States District Court for the District of Kansas; true and correct copies of which are hereto attached, marked Exhibits A, B, C, D and E, and made a part hereof.

(6) That on December 24, 1920, the United States District Court for the District of Kansas in *Landon v. Court of Industrial Relations for the State of Kansas, et al.*, No. 136-N, entered a decree relating to certain contracts between the Kansas Natural Gas Company and the local distributing companies, including the contract Exhibit B to the bill of complaint; a true and correct copy of said decree is hereto attached, marked Exhibit F, and made a part hereof.

(7) That on or about the 24th day of December, 1920, the United States District Court for the District of Kansas, made and entered its decree ordering the receivers of the Kansas Natural Gas Company to return the property of the Kansas Natural Gas Company under its control to the Kansas Natural Gas Company on January 1st, 1921, which said order was complied with, and said property was returned to the corporation, and since said date has been operated and the business thereof conducted by said corporation.

(8) That on May 3, 1920, the Kansas City Gas Company filed an application with the Public Service Commission of Missouri; a true and correct copy of which is hereto attached, marked Exhibit G, and made a part hereof.

72 (9) That on June 14, 1920, the Public Service Commission of Missouri made and filed and issued its report and order upon said application of the Kansas City Gas Company made on May 3, 1920; a true copy of which report and order is hereto attached, marked Exhibit H, and made a part hereof.

(10) That the Kansas Natural Gas Company produces or-and purchases and transports gas from points in the state of Oklahoma and points in the state of Kansas to points in the states of Kansas and Missouri; that it sells no gas direct to consumers except to a few mainline consumers and to consumers in the Joplin, Missouri, mining district; that all of the gas produced or purchased in Oklahoma and in Kansas by the Kansas Natural Gas Company is so intermingled in the pipe lines that it cannot be distinguished; that said gas is transported to the various cities in the states of Kansas and Missouri where the Natural Gas Company maintains permanent physical connections within the state of Missouri, as hereinafter described between its pipeline system and the plant and street main system of the Kansas City Gas Company; that the Kansas City Gas Company maintains gas-holders in connection with its distribution system, having a reserve storage capacity of 5,000,000 cubic feet of gas. In case of line-breaks, interruptions or shortages in the pipeline supply, this reserve holder gas is used to supply the consumers.

(11) That the gas delivered by the Kansas Natural Gas Company to the Kansas City Gas Company is measured at two separate measuring stations operated by said Kansas Natural Gas Company. One is located immediately west of the Kansas-Missouri state line in Kansas, from which station the Kansas Natural Gas Company's pipeline is extended some eight feet into the state of Missouri and upon a public street of Kansas City, Missouri, and there physically and per-

manently connected to the street main system of the Kansas City Gas Company. The gas delivered at this station is measured or computed and billed to the Kansas City Gas Company in accordance with the measurements of the meter located in Kansas. The second measuring station is located near the Kansas-Missouri state line in the state of Missouri at which point about one-third of the total gas furnished to the Kansas City Gas Company is measured and delivered. The Kansas Natural Gas Company maintains at this second connection about 500 feet of pipe line between the Kansas and Missouri state line and said measuring station which pipeline is located on a public street of Kansas City, Missouri. The gas furnished through this station is measured or computed and billed to the Kansas City Gas Company in accordance with the measurements of the meter located in Missouri. The Kansas Natural Gas Company has no franchise granted by the city of Kansas City, Missouri, authorizing it to occupy the streets, alleys or public places upon and along which to lay, maintain or operate its pipelines.

(12) That there are no advance orders given by the Kansas City Gas Company to the Kansas Natural Gas Company for the shipment of any definite quantity of gas to Kansas City, Missouri, at any given time, but said gas is furnished and delivered continuously to meet the requirements of the Kansas City Gas Company, as governed by the requirements of its consumers from time to time.

73 (13) That the pipe lines operated by the Kansas Natural Gas Company extend from the state of Oklahoma into and through the state of Kansas and into the state of Missouri, and said Kansas Natural Gas Company furnishes gas to local distributing companies in some thirty towns and villages in the states of Kansas and Missouri; that said pipe lines lie, in the main, on the privately owned rights-of-way of the Kansas Natural Gas Company, but cross public highways and, in some instances, run along the public highways in the states of Missouri and Kansas.

(14) That the population of Kansas City, Missouri, is approximately 360,000, and that the population served by the distributing companies receiving their gas from the Kansas Natural Gas Company in Kansas and Missouri exceeds one-half million.

(15) That no joint ownership or inter-corporate relation exists between the Kansas Natural Gas Company and Kansas City Gas Company or any other local distributing company.

II.

That the contract referred to in paragraph (1) of said stipulation attached to the bill of complaint as Exhibit B, and admitted by the answer, reads as follows:

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74 *Agreement between the Kansas City Pipe Line Company and
Hugh J. McGowan, Charles E. Small and Randal Morgan.*

Dated December 3, 1906.

11. This agreement shall, as between the parties hereto, and their respective heirs, executors, administrators, successors and assigns, take the place of and stand instead of that certain other agreement, between the parties hereto, executed and delivered, November 17, 1906, but if the city of Kansas City shall acquire the gas plant, pipes and property of the grantees named in said ordinance No. 33887, then this agreement shall at once terminate and become void, and thereupon the said other agreement shall again come into force and effect as if this agreement had never been made."

74-1 This agreement, made this 3rd day of December, 1906 between the Kansas City Pipe Line Company, a corporation organized under the laws of the State of New Jersey, party of the first part, and Hugh J. McGowan, of Indianapolis, Indiana, Charles E. Small, of Kansas City, Missouri, and Randal Morgan, of Philadelphia, Pennsylvania, parties of the second part.

Whereas, the party of the first part is the owner of gas lands and leases in the gas belt of Kansas and a pipe line for the conveying of natural gas from the gas fields in the State of Kansas to a point at or near the city limits of Kansas City, Missouri, and is desirous of entering into a contract with the parties of the second part for the transportation and supply of natural gas to them;

And whereas, the parties of the second part are the owners of an ordinance of the City of Kansas City, Missouri, granting the right to lay, acquire and maintain pipes in Kansas City, Missouri, for the purpose of supplying natural gas to said city and its inhabitants, copy of which ordinance is attached hereto marked "Exhibit No. 1," and desire to secure a supply of natural gas for the said city and its inhabitants.

Now, therefore, in consideration of the mutuality hereof it is hereby agreed between the parties hereto as follows:

1. The party of the first part hereby agrees that it will during the period of such ordinance, or any extension or renewal thereof, or of any ordinance which may be obtained, either in the interest of the parties of the second part, or of their property, supply and deliver through its said pipe line or lines, to said parties of the second part, or any successor in the ownership of the property for the distribution of gas for Kansas City, Missouri, at a pressure of twenty (20) pounds at the point of delivery above mentioned, natural gas

74-2 in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in this contract, for the consideration hereinafter mentioned. However, as the production of gas from the wells and the conveying of it from long distances is subject to accidents and interruptions and failures, the party of the first part does not under his contract undertake to furnish the parties of the second part with an uninterrupted supply of

gas for the period named herein, but only to furnish such supply for such a period of time as the wells and pipe lines of the party of the first part and such other resources as the party of the first part shall be able to command are capable of supplying. And it is expressly understood and agreed by the parties of the second part that the party of the first part shall not be liable for any loss, damage or injury that may result either directly or indirectly from such shortages or interruptions, but said party of the first part agrees to use diligence to supply the parties of the second part with a constant and sufficient quantity of merchantable gas for all consumers.

2. It is hereby agreed between the parties hereto that the parties of the second part may make special contracts for the sale of natural gas for manufacturing purposes in said city at lower rates than those specified in said ordinance, and that they shall and will make such special contracts in accordance with their agreement to that effect contained in Section 13 of said ordinance, copy of which is hereto attached.

In order to protect the domestic trade, however, the parties of the second part may, without notice, if the supply of natural gas shall make it necessary to do so, reduce the amount of such gas to be furnished under any such special contracts or entirely stop the supply

of the same, and the agreement of the party of the first part
74-3 herein to furnish a full supply of natural gas shall not apply to such gas to be sold for manufacturing purposes if the same shall impair its ability to furnish a full supply under this contract as to pressure, etc., for the domestic trade, excepting, however, that the parties of the second part shall always have a right to sell natural gas to manufacturers at the same rates and under the same terms and conditions as to domestic consumers, and the parties of the second part agree that any contract they make to furnish gas to manufacturers shall contain provisions by which the parties of the second part may without notice diminish the amount of gas supplied under such contract or entirely stop the same.

So long as the party of the first part is able to supply the same, the parties of the second part agree to buy from the party of the first part all the gas they may need to fully supply the demand for domestic consumption in the said city and to pay to the party of the first part for the natural gas which they shall receive from said party of the first part for all purposes during the first two years a sum equal to sixty per cent. of their gross receipts from the sale of such natural gas in said city of Kansas City, Missouri, and thereafter a sum equal to sixty-two and one-half per cent. of such gross receipts. The parties of the second part make no agreement with the party of the first part respecting the rates at which they shall sell natural gas to any consumers in Kansas City, Missouri, but expressly reserve to themselves the right to charge their consumers for natural gas any rates not exceeding those mentioned in said ordinance which they may agree upon with such consumers but if they shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said

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74-4 ordinance, or, except in compliance with their agreement to that effect contained in said Section 13 of said ordinance, to sell gas to manufacturers at a less rate than fifteen cents per thousand cubic feet, and the party of the first part shall be unwilling to accept as its compensation therefor sixty or sixty-two and one-half per cent., as the case may be, of the gross receipts of the parties of the second part, as aforesaid, for gas so sold, the party of the first part shall be under no obligation to furnish the gas so sold at such lower prices, and the parties of the second part shall be at liberty to obtain the same from such other sources as they may find available.

3. A statement shall be rendered by said parties of the second part to the party of the first part on or before the fifteenth day of each month, showing the amount of receipts during the previous month and the amount of outstanding and uncollected bills.

Payments hereunder shall be made by the parties of the second part to the party of the first part upon the fifteenth day of each month for the party of the first part's percentage of all collections made during the previous month. In order to enable the party of the first part to verify the correctness of payments made by the parties of the second part, the party of the first part shall have the right, through its duly appointed representatives, at all times during ordinary business hours, to have such access to such books of the parties of the second part as may be necessary to enable it to verify the gas sales of the parties of the second part and the amounts and dates of collection for the same.

4. The parties of the second part hereby agree that they will

(1) On or before January 1, 1907, be ready to furnish and be furnishing natural gas on not less than seventy-five miles of mains to all consumers thereon who desire the same, and who have complied with their reasonable rules and regulations; and (2) on or before March 1, 1907, be ready to furnish and be furnishing natural gas on not less than fifty additional miles of mains to all consumers thereon who may desire the same and have complied with said reasonable rules and regulations; and (3) on or before August 1, 1907, be ready to furnish and be furnishing natural gas to all present consumers on the lines of the Kansas City Missouri Gas Company who may desire the same and who have complied with said reasonable rules and regulations; provided that the parties of the second part shall not be required to furnish patrons from circulating mains; and by advertising, solicitation and all other ordinary methods in vogue with enterprising gas companies to encourage and increase their business. Provided that if the commencement of work or the laying of pipes by the parties of the second part necessary for the furnishing of gas to consumers as herein agreed, or the laying of pipes inside or outside the city or the delivering of natural gas at or within the corporate limits of the city by the parties of the second part or by any persons with whom they may contract for their supply of natural gas, shall be prevented, hindered or delayed by injunction or legal process of any kind against the parties of the second part or such other persons, or by

inclement days or by labor strikes, or by any cause beyond the control of the parties of the second part or such other persons, or if the acquisition of the ownership, use or control of the pipes and property of the Kansas City Missouri Gas Company provided for in said ordinance hereto attached shall be prevented, hindered or delayed by injunction or other legal proceedings, the time consumed by such prevention, hindrance or delay shall not be considered any part of the times provided for herein for supplying natural gas in the city, as required hereby, and the times provided for herein for furnishing gas to consumers shall be correspondingly extended for a like period or periods.

5. It is further covenanted and agreed between the parties hereto that the parties of the second part will not supply manufacturers at a greater pressure than four (4) ounces at the meter; provided, that if the pressure of gas at the meter is greater than four (4) ounces per square inch, the volume of gas shall be corrected to four (4) ounces pressure and charged to the consumer at the corrected volume.

6. It is further covenanted and agreed by and between the parties hereto that all gas sold shall be supplied through meters of approved design, that such meters shall be read and inspected once each month, and shall be kept in such working order and efficiency by the parties of the second part that each meter shall register as nearly accurately as possible the amount of gas passed through it; that the parties of the second part will at all times permit the officers or authorized agents of the party of the first part to inspect their mains, pipes, regulators, meters and appliances for the purpose of verifying their monthly statements as herein provided, and for the purpose of determining the condition of said mains, pipes, regulators, meters and other appliances; and further, that said parties of the second part will forward to the party of the first part a monthly record of the number of contracts made and cancelled, and the number of meters set, connected and disconnected, together with the total number of consumers at the end of each month, and will make and keep at their office a copy of such contracts, together with a full and complete record of the same, and of all meters used; and it shall be the duty of the parties of the second part to keep and maintain their distributing system in good order and condition.

7. It is further covenanted and agreed that the parties of the second part shall not be liable to the party of the first part for any portion of their receipts from the city of Kansas City, Missouri, for street lamps, so far as the street lamp posts, or an equivalent number, set and in place on September 27, 1906, (the date of the passage and approval of said ordinance) are concerned, and as to any additional number it is hereby agreed that ten thousand (10,000) cubic feet per lamp per annum, at fifteen (15) cents per thousand cubic feet, shall be the agreed upon proportion of the receipts of said parties of the second part from that source on which the percentage of the party of the first part for gas shall be reckoned. The party of the first part agrees to furnish natural gas to the parties of the second part

free of charge for use in the said street lamp posts, or an equivalent number, set and in place on said September 27, 1906, and to additional posts that may be set by the city at the rate of one hundred (100) lamps for each eight thousand (8,000) inhabitants, over and above two hundred thousand (200,000) inhabitants, population to be calculated for the purpose on the basis of two and one-half times the number of names shown by the city directory having the largest circulation including the names of business firms, should the city of Kansas City, Missouri, elect to take natural gas free and itself furnish or contract with others for the incandescent equipment, and for maintaining, repairing, cleaning, lighting and extinguishing. And the party of the first part further agrees to furnish natural gas to the parties of the second part free of charge for lighting the City Hall, City Prison, and all city buildings in said city.

74-8 8. It is agreed between the parties hereto that if at any time during the period of said ordinance while the parties of the second part are buying from the party of the first part all the natural gas they are distributing and selling in the said city, the said party of the first part, its assigns, lessee or lessees, shall furnish any natural gas to any person or corporation for use in supplying said city or any of its inhabitants with such gas, otherwise than under this agreement, then, and in any such case, the provision contained in Section No. 2 hereof, in the following words, to-wit: "but if they shall at any time agree to sell gas to domestic consumers or any persons other than manufacturers at less than the maximum rates mentioned in said ordinance, or, except in compliance with their agreement to that effect contained in said Section 13 of said ordinance, to sell gas to manufacturers at a less rate than fifteen cents per thousand cubic feet, and the party of the first part shall be unwilling to accept as its compensation therefor sixty or sixty-two and one-half per cent, as the case may be, of the gross receipts of the parties of the second part, as aforesaid, for gas so sold, the party of the first part shall be under no obligation to furnish the gas so sold at such lower prices," shall at once become inoperative and cease to have any effect but the party of the first part, its assigns, lessee or lessees, shall be bound to supply and deliver to the parties of the second part natural gas to fully supply the demand for all purposes of consumption in said city for sixty or sixty-two and one-half per cent, as the case may be, of the gross receipts of the parties of the second part from the sale of natural gas in said city at any prices for which the said parties of the second part may choose to sell the same.

74-9 9. The parties of the second part shall have the right, authority and power to bargain, grant, sell, assign, transfer, set over, mortgage, pledge or otherwise convey this agreement and all their rights, titles and interests hereto, herein and hereunder; and they agree that they will, on or before December 31, 1907, assign and convey this agreement and all of their rights, titles and interests hereto, herein and hereunder to a corporation organized under the laws of the State of Missouri and competent to take such assignment, and that such corporation shall thereupon accept such assignment

and the party of the first part agrees that upon such assignment and acceptance, and written notice thereof to the party of the first part, accompanied by a copy of the assignment, and by a copy of the acceptance, the parties of the second part shall ipso facto be released from all obligations to the party of the first part hereunder; and the party of the first part further agrees to execute and deliver to the parties of the second part all such evidences of their release as they may reasonably require. The said corporation organized under the laws of the State of Missouri, and its successors and assigns, shall also have the right, authority and power, to bargain, grant, sell, assign, transfer, set over, mortgage, pledge or otherwise convey this agreement and all its or their rights, titles and interests hereto, herein and hereunder.

10. This agreement shall be binding upon the successors and assigns of the parties hereto.

11. This agreement shall, as between the parties hereto, and their respective heirs, executors, administrators, successors and assigns, take the place of and stand instead of that certain other agreement, between the parties hereto, executed and delivered, November 17, 1906, but if the city of Kansas City shall acquire the gas 74-10 plant, pipes and property of the grantees named in said ordinance No. 33887, then this agreement shall at once terminate and become void, and thereupon the said other agreement shall again come into force and effect as if this agreement had never been made.

In witness whereof the parties hereto have duly executed these presents the day and year first above written.

[Corporate Seal.]

THE KANSAS CITY PIPE LINE COMPANY,
By PAUL THOMPSON,

Attest: *President.*
C. M. LATOURETTE,
Secretary.

Signed, sealed and delivered by Kansas City Pipe Line Company
in presence of

D. N. OGDEN.
W. F. DOUTHIRT.

HUGH J. MCGOWAN.

[SEAL.]

Signed, sealed and delivered by Hugh J. McGowan in presence of
ANNA L. BOWMAN.

CHARLES E. SMALL.

[SEAL.]

Signed, sealed and delivered by Charles E. Small in presence of
CALEB S. MONROE.

RANDAL MORGAN.

[SEAL.]

Signed, sealed and delivered by Randal Morgan in presence of

GEORGE S. PHILLER.
W. F. DOUTHIRT.

74-11 STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Be it remembered That on this 3rd day of December, 1906, before me, the undersigned, a Notary Public within and for the county and state aforesaid, personally came Paul Thompson, President of The Kansas City Pipe Line Company, a corporation duly organized, incorporated and existing under the laws of the State of New Jersey, who is personally known to me to be such officer, and who is personally known to me to be the same person who executed, as such officer, the within instrument of writing, and such person duly acknowledged the execution of the same to be the act and deed of said corporation, and of himself, the President thereof.

In witness whereof, I have hereunto subscribed my name, and affixed my official seal, on the day and year last above written.

[Notarial Seal.]

F. H. MACMORRIS,
Notary Public.

My commission expires 2/12/1909.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I, Thomas K. Finletter, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, do by my Deputy James W. Fletcher, authorized by Act of Assembly of May 26, 1897, Certify, That F. H. MacMorris, Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed Instrument and thereon written, was at the time of such acknowledgment a Notary

74-12 Public for the Commonwealth of Pennsylvania, residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 4th day of December in the year of our Lord one thousand nine hundred and six.

[SEAL.]

THOMAS K. FINLETTER,

Prothonotary,

By JAS. W. FLETCHER,

Dep. Prothonotary Durante Absentia Secundum Legem.

STATE OF INDIANA,

County of Marion, ss:

On this 6th day of December, 1906, before me personally appeared Hugh J. McGowan, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal at Indianapolis, in the State and County aforesaid, the day and year last aforesaid.

My commission as a Notary Public will expire on the 19th day of September, 1908.

(Notarial Seal.)

ANNA L. BOWMAN,

Notary Public.

74-13 STATE OF INDIANA,

County of Marion, set.

I, William E. Davis, Clerk of the County of Marion, in the State of Indiana, and also Clerk of the Circuit Court, within and for said County and State, the same being a Court of Record, and having a seal, do hereby certify that Anna L. Bowman, whose name is subscribed to the acknowledgment to the annexed instrument, was at the time of taking such acknowledgment, to-wit: Dec. 6, 1906, an acting Notary Public within and for the County aforesaid, duly commissioned and qualified, and authorized by the laws of the State of Indiana, to take and certify the same, as well as take and certify all affidavits, and the acknowledgment and proof of deeds or conveyances, and all other instruments of writing.

And further, that I am well acquainted with the handwriting of said Anna L. Bowman, and verily believe that the signature to said Certificate or Proof of Acknowledgment or Jurat is genuine and that said instrument is executed and acknowledged according to the laws of the State of Indiana.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, at Indianapolis, Indiana, this 6th day of December, A. D. 1906.

[SEAL.]

WILLIAM E. DAVIS,

Clerk.

STATE OF MISSOURI,
County of Jackson, ss:

On this 7th day of December, 1906, before me personally appeared Charles E. Small, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

74-14 In witness whereof, I have hereunto set my hand and affixed my official seal at Kansas City, in the State and County aforesaid, the day and year last aforesaid.

My commission as a Notary Public will expire on the eighteenth day of September, 1910.

(Notarial Seal.)

CALEB S. MONROE,
Notary Public.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 4th day of December, 1906, before me personally appeared Randal Morgan, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

In witness whereof, I have hereunto set my hand and affixed my official seal at Philadelphia, in the State and County aforesaid, the day and year last aforesaid.

My commission as a Notary Public will expire on the 12th day of February, 1909.

(Notarial Seal.)

F. H. MACMORRIS,
Notary Public.

74-15

EXHIBIT No. 1.

No. 33887.

An Ordinance Authorizing Hugh J. McGowan, Charles E. Small, and Randal Morgan, the survivors or survivor of them, and Their or His Assigns, to Lay, Acquire, and Maintain Pipes in Kansas City for the Purpose of Supplying Natural Gas to said City and Its Inhabitants.

Be it Ordained by the Common Council of Kansas City:

Section 1. Subject to the provisions of the present city charter, and to the same provisions so far as they may be embodied in any future charter of the city, permission, right, privilege and authority are hereby granted unto Hugh J. McGowan, Charles E. Small and Randal Morgan, the survivors or survivor of them, and their or his assigns, for the full period of thirty (30) years from and after the approval and taking effect of this ordinance, within the present or any future corporate boundaries of the City of Kansas City, to lay and maintain gas pipes, regulators and appliances below the surface of the streets, avenues, boulevards, alleys and public grounds of said

city, and on the bridges and viaducts owned by said city (provided such bridges and viaducts are of sufficient strength to carry such pipes), for the purpose of carrying and distributing natural gas and selling and supplying the same for private and public use, all upon the conditions provided for in this ordinance.

Section 2. Since it is a matter of large financial concern to the people of Kansas City, as well as the city itself, to secure natural gas within the shortest reasonable time, the grantees (which term 74-16 wherever used in this ordinance shall include the several grantees herein named, the survivors or survivor of them and their or his assigns) agree that they will.

(1) on or before January 1, 1907, be ready to furnish and be furnishing natural gas on not less than seventy-five miles of mains to all consumers thereon who desire the same, and who have complied with the reasonable rules and regulations of the grantees; and

(2) on or before March 1, 1907, be ready to furnish and be furnishing natural gas on not less than fifty additional miles of mains to all consumers thereon who may desire the same and have complied with said reasonable rules and regulations; and

(3) on or before August 1, 1907, be ready to furnish and be furnishing natural gas to all present consumers on the lines of the Kansas City Missouri Gas Company who may desire the same and who have complied with said reasonable rules and regulations; provided that the grantees shall not be required to furnish patrons from circulating mains.

And said grantees shall within ten (10) days after this ordinance becomes a law file their written acceptance of the same as hereinafter provided, and at the time of filing their written acceptance shall deposit with the City Treasurer, as a special fund fifty thousand dollars (\$50,000.00) in cash, to become the property of the city, unless the requirements of paragraph one (1) of this section hereinbefore mentioned shall be performed within the time above specified.

Whenever the grantees shall file with the City Treasurer a certificate of the Board of Public Works, or other Board or officer of the city then performing the functions of the present Board of Public

74-17 Works, stating that the grantees have complied with the requirements of paragraph one (1) of this section respecting the furnishing of natural gas in the city, the Treasurer shall repay to the grantees the said sum of fifty thousand dollars (\$50,000.00); and it shall be the duty of the Board of Public Works, upon compliance by the grantees with the said requirements, to make and deliver to them said certificate.

In order to secure their compliance with the requirements of paragraphs two (2) and three (3) of this Section respecting the furnishing of natural gas in the city, the grantees shall, within twenty (20) days after filing their acceptance of this ordinance, execute and deliver to the city their bond, in form approved by the City Counselor, with surety to the approval of the Mayor and City Comptroller, in the sum of two hundred and fifty thousand dollars (\$250,000.00), to be paid to the city as liquidated damages if the grantees shall fail

to comply with the said requirements, said sum being agreed upon by both parties hereto as representing the liquidated damages, for the reason that said parties appreciate and agree that it will be impossible to measure such damages after the breach; and said bond shall be by the city surrendered and canceled on the certificate of the Board of Public Works, which shall be granted when grantees have fulfilled said requirements.

If the commencement of work or the laying of pipes by the grantees necessary for the furnishing of gas to consumers as in this section agreed, or the laying of pipes inside or outside the city or the delivering of natural gas at or within the corporate limits of the city by the grantees or by any persons with whom the grantees may contract for their supply of natural gas, shall be prevented, hindered or delayed by injunction or legal process of any kind against the grantees or such other persons, or by inclement days or by labor strikes, or by any cause beyond the control of the grantees or such other persons, or if the acquisition of the ownership, use or control of the pipes and property of the Kansas City Missouri Gas Company hereinafter provided for shall be prevented, hindered or delayed by injunction or other legal proceedings, the time consumed by such prevention, hindrance or delay shall not be considered any part of the times provided for herein for supplying natural gas in the city, as required hereby, and the times provided for herein for furnishing gas to consumers shall be correspondingly extended for a like period or periods but such delay or hindrance, in order to entitle the grantees to an extension of time hereunder, must actually so hinder and delay, and must so result after the grantees have done all in their power to prevent and obviate such hindrance and delay. But no such delay shall be excused or time extended on account thereof, if the grantees can, by the exercise of reasonable diligence, and at reasonable expense obtain natural gas elsewhere.

Section 3. All pavements and sidewalks shall be taken up and all excavations in said streets, avenues, boulevards, sidewalks, lanes, highways, alleys and public grounds, shall be made under the supervision of the Board of Public Works, and such pipes, regulators and appliances shall be located in such portion of the streets, avenues, boulevards, lanes, highways or public grounds as may be designated by the Board of Public Works, using alleys as far as practicable; provided, that said pavements and sidewalks and excavations shall be replaced and restored by and at the expense of the grantees to their former condition; and if such pavement shall have been laid under any guaranty for its maintenance and repair for any period of time, the said grantees shall also keep said restored pavements in repair for the unexpired period of such guaranty. Should said grantees fail or refuse to replace or restore said pavement, sidewalk and excavation, within a reasonable time, then the same may be replaced and restored by the city, under the direction of the Board of Public Works, at the cost and expense of the grantees, who shall, before commencing the work of making any excavation, deposit with the City Treasurer the sum of one thousand dollars (\$1,000.00) in money, for the faithful compliance with this section;

and as often as any portion of said sum is used by said Board, said grantees shall on notice from said Board deposit a corresponding sum with the City Treasurer. Before any excavations are made by said grantees at any time in any street or highways, for any of the purposes named in this ordinance, a permit therefor shall be obtained from the proper officer of said city, which permit shall state the particular part of the street or highway where said work is to be done and the length of time said permit shall authorize work to be done thereunder. The work done under such permits shall be under the inspection of a competent inspector designated by the City Engineer, for whose time, reasonably employed in such service, the grantees shall repay the city at the rate of three dollars and sixty cents (\$3.60) per day.

Section 4. Said grantees shall not open or encumber at any one time more of any such highway or public place than may, in the opinion of the Board of Public Works, be necessary to enable them to proceed with advantage in laying or repairing mains and pipes, nor shall they permit any such highway or public place so opened or encumbered by them to remain open or encumbered for a longer period of time than shall, in the opinion of the Board of
74-20 Public Works, be necessary. In all cases where any such highway or public place shall be encumbered or excavated by the said grantees they shall take all precautions for the protection of the public usual in such circumstances, and such as may now or hereafter be required by the general ordinances of said city. Whenever the city shall grade or regrade any street, alley or public highway, along or across which said grantees shall have constructed any pipes or mains, it shall be the duty of said grantees, at their own expense to change said pipes or mains so as to conform to the street, alley or public highway so graded or regraded, on an order therefor from the Board of Public Works of said city.

Section 5. Said grantees shall, at their own expense, bring connecting pipes for consumers to the inside of the curb lines, or to the property line in such cases in which mains are laid in alleys, and construct shut-offs; and may, with the approval of the Board of Public Works, make, such reasonable rules and regulations for making connections for private consumers with the distributing or service pipes of said grantees as they may deem proper. No person, company or corporation shall make any such connections without first obtaining a permit therefor from said grantees. Said grantees shall at all times keep and maintain such pressure of gas in all places where the same may be furnished to Kansas City and its inhabitants as may be required by ordinance; provided, the pressure so required shall be reasonable and practicable.

Section 6. Said grantees shall extend their pipes and mains for the distribution of natural gas on such graded streets, avenues, sidewalks, lanes, highways, alleys and public places as may be named
74-21 by ordinance, followed by notice from the Board of Public Works to proceed thereunder, and within the time specified

in said notice; provided, that in every such case at least three consumers on an average for every two hundred feet of extension so made necessary shall first, in writing, agree to take such gas from said grantees for a period of not less than one year, at the general rates; provided, that if the graded street, avenue or highway is about to be paved under ordinances of said city, such extension shall be made ahead of the paving, including connections to curb in cases where buildings are already located, without regard to the number of consumers thereon, and gas shall be furnished by grantees on such extensions. Every ordinance providing for extending pipes and mains as above mentioned shall have appended thereto the signatures of the required number of prospective consumers, and such ordinance shall contain a provision that in case such prospective consumers, or any of them, causing the reduction below the required number of consumers, fail within thirty (30) days after demand has been made by said grantees, to enter into the contract with the grantees as herein required, such ordinance shall not be enforced. If the grantees should fail or refuse to obey any such ordinance for a period of ninety (90) days after the approval of the same, and after said consumers have made the agreements aforesaid, they shall pay to the city the sum of five dollars (\$5) for each and every day that such failure or refusal continues. Failure to obey each ordinance shall constitute a separate violation, and shall entitle the city to the aforesaid sum for the violation of each and every specific independent case.

Section 7. Said grantees shall have the right to shut off gas from any consumer who may be in arrears for a longer period than fifteen (15) days, and the delinquent consumer can reinstate his
74-22 right to obtain gas on payment of the bill and shutting off
charge of fifty cents.

Section 8. In constructing, repairing and operating said gas plant said grantees shall use every reasonable and proper precaution to avoid damage or injury to persons or property, and shall, at all times and in all places, hold and save harmless the said city from all and every such damage, injury, loss or expense, caused or occasioned by reason of any act or failure to act of said grantees in the construction, repairing or operating of said gas plant or any part thereof, or in the paving, repaving or repairing of any street, or by reason of any act done by said grantees.

Section 9. The said grantees shall file with the Board of Public Works of said city, on or before the first day of February in each and every year, a statement or plat, duly verified, of all pipes, mains, shut-offs and appliances of every kind and nature laid, constructed or built by them in said highways or public places, during the preceding calendar year, and the location thereof; which shall be, by said Board of Public Works, copied into a book kept by it for that purpose.

Section 10. For the purpose of enforcing the provisions of this ordinance and securing the correct measurements of gas furnished

under the same and the proper pressure of said gas to produce the best obtainable results with the least consumption of gas, with due regard to the reasonableness and practicability of such pressure, and to prevent the waste thereof and to protect the city in its corporate rights, and to protect the consumers in their rights, the city shall have the right to provide, by ordinance, for the appointment of one or more inspectors or measurers of gas, and to prescribe their duties

by ordinance, and to pass such ordinances as may be necessary to enforce the provisions of this ordinance. The city shall pay all costs and charges of such inspection and measurements, the same to be regulated and fixed by ordinance, including the salaries of said inspectors or measurers, and the grantees shall reimburse the city for all these charges, the money to be paid within thirty (30) days after the payment thereof and demand therefor by the city; provided such charges shall be reasonable. The grantees shall also supply and set meters for measuring gas free of charge to consumers, which shall, however, be and remain the property of the grantees and freely accessible to them at all reasonable times, and consumers shall be responsible for negligently or wilfully injuring any meters.

Section 11. The said city shall enact all needful and requisite ordinances to protect said grantees, their works and property, from damages, impositions and frauds, and to prevent unnecessary waste of gas, and said grantees shall have the power to make all reasonable needful rules and regulations for the collection of their revenues, prevention of waste and the conducting and management of their business as they may, from time to time, deem necessary; but the city shall incur no liability by any failure to enact any such ordinance, and the city does not hereby waive its rights of governmental control over this subject matter.

Section 12. Said grantees shall have the right to shut off the gas temporarily from their mains and pipes or any portion thereof, for the purpose of making repairs or extensions of their plant or while repairs or extensions are being made to the pipes or apparatus by which the grantees obtain their supply of natural gas, and shall not be liable to said city or any consumer for any damage occasioned by said temporary suspension of said supply of gas; provided, such repairs and extensions are made with due diligence; and provided, that whenever it is practicable notice of such shutting off of the supply of gas shall be given to consumers by publication in one or more daily newspapers in said city.

Section 13. The said grantees shall be entitled to charge and collect from consumers of such gas, during the period of five years from and after natural gas is first furnished hereunder at the rate of not to exceed twenty-five cents per thousand cubic feet, and during the period of five years next thereafter at the rate of not to exceed twenty-seven cents per thousand cubic feet, and thereafter during the period of the aforesaid grant at the rate of not exceeding thirty cents per thousand cubic feet, and may also make special contracts with consumers at less than the general rate then in force, based upon the

amount of gas used and in the conditions of the contract, which special rates shall be the same to all consumers using the same amount of gas under the same contract conditions, and schedules of such special rates and the contract conditions shall be filed with the city clerk, and each and every change therein shall also be filed with the city clerk, and be open to public inspection. The grantees agree that they will at all times make special contracts at as low rates as those at which natural gas is sold at the time to any consumers of the same class using the same amount of gas under the same contract conditions who are located approximately as distant from the fields from which they are at the time supplied as Kansas City, Missouri, is from the fields from which it is at that time supplied and who are supplied by the grantees, or anyone from

74-25 whom the grantees obtain their supply, or anyone whose supply is obtained from those from whom the grantees obtain their supply; provided that this agreement to make such special contracts at such rates shall not be construed to compel the grantees to make such special contracts at as low rates as those in effect at the time in any locality where the grantees, or those from whom the grantees obtain their supply, or any one supplied by those from whom the grantees obtain their supply, may be in bona fide competition with any other supplier of natural gas in such locality; but if the demand from special rate consumers threatens the general supply, the grantees may shut off the supply from any special rate consumer, which shall include all other than domestic consumers, in whole or in part, and if the grantees fail or refuse to do so, the city council may by ordinance require the grantees so to do; provided always that the said grantees shall have the right to charge ten (10) per cent additional to all consumers who are in arrears for a longer period than ten (10) days; and provided, further, that the grantees may charge and collect from each person who has a meter installed a minimum monthly bill of fifty cents; provided, however, that if the bill for natural gas consumed in any month shall at the rate then in force exceed the sum of fifty cents, such consumer shall not be charged any minimum bill for that month.

Under the permission and authority hereby granted, the grantees shall furnish natural gas for illuminating, heating and mechanical purposes, which shall at all times be of the same character and quality as when it comes from the earth; and it shall not be mixed with air or otherwise adulterated.

74-26 Section 14. Should the supply of natural gas, obtainable by grantees reasonably accessible, be, at any time hereafter during the life of this ordinance, inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the Common Council of Kansas City so find at any time (and in the event of a disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so, but shall manufacture and furnish manufactured gas to said city and its inhabitants through said mains and pipes under the provisions of this ordinance as far as applicable and subject to all

the terms and provisions contained in the ordinance number 6658 granted to Milton J. Payne and others passed August 24, 1895, and the ordinance number 6125 granted to Robert M. Snyder and others, passed January 10, 1895, and the ordinance number 8033, entitled: "An ordinance granting the consent of Kansas City to the consolidation of the Missouri Gas Company and the Kansas City Gas Company," until the expiration of said ordinances and no longer, except as to price, which shall be settled by arbitration, in the following manner:

The grantees shall not discontinue furnishing natural gas without serving at least six months' written notice upon the Mayor of Kansas City of their intention so to do. If grantees and the city cannot agree on the price which shall be thereafter charged for manufactured gas within ninety (90) days after the service of such notice Kansas City and said grantees shall each select one of the judges of the circuit court of Jackson County, Missouri, as an arbitrator, and the two judges so appointed shall immediately choose a third judge of said circuit court. The three judges so appointed

74-27 shall proceed at once to investigate the matter and shall hear fully all such evidence as is presented to them by either party and shall within ninety (90) days after their appointment make their finding in writing, fixing the just and reasonable maximum rate to be charged by the grantees for manufactured gas during the life of the franchises above described; and said finding, when signed by not less than two of said judges, shall be conclusive between the city and the grantees herein; one copy shall be filed in the office of the city clerk of Kansas City, another with the grantees, and said grantees shall at no time have the right or power to return to the manufacture, distribution or sale of manufactured gas in Kansas City until after such arbitration and award as is herein provided for unless they shall conform to the provisions of said award.

Section 15. As a consideration for the aforesaid grant, the said grantees are hereby required to make a true and faithful report under oath to said city on the first day of February and August in each year for the six months ending on the last day of December and June last preceding, showing the gross amount of money received by them from all such gas delivered to consumers within the corporate boundaries of said city, and shall pay into the City Treasury within fifteen (15) days thereafter an amount equal to two (2) per cent of said gross receipts for said preceding six months. Said city shall have the right at all reasonable times to make such examination and inspection of the books of said grantees as may be necessary to determine the correctness of such reports.

Section 16. All things provided to be done by the Board of Public Works, or other department of the city, may be performed

74-28 by any other official or department of said city when so provided by ordinance or charter of said city.

Section 17. If the said grantees shall do or cause to be done any act or thing by this ordinance prohibited, or shall fail, refuse or neglect to do any act by this ordinance required, they shall forfeit all rights and privileges granted by this ordinance, and this franchise and all rights thereunder granted shall ipso facto cease, terminate and become null and void, provided such failure to comply with the conditions of this ordinance shall continue unrectified for sixty (60) days after written notice, thereof from the Board of Public Works of said city, or the Common Council of said city.

Section 18. The said grantees shall, within ten (10) days after this ordinance becomes a law, file in the office of the City Clerk of said city a written acceptance of the terms, obligations and conditions in this ordinance set forth, in such form as shall be approved by the City Counselor, and unless such written acceptance shall be so filed, this ordinance shall become null and void.

Section 19. As long as natural gas is furnished and sold to the inhabitants of said City of Kansas City under this franchise, said grantees shall, in consideration of this grant, furnish free to the City of Kansas City natural gas for light in the City Hall, City Prison and all city buildings; provided, that all such lights shall be kept extinguished when not needed for illuminating purposes; the city to furnish its own burners, mantles, fixtures and appurtenances, and maintain and keep the same in repair.

Section 20. In order that the city and its inhabitants may receive the benefits of natural gas more speedily and with less disturbance of the streets and inconvenience to the public than would otherwise be possible, the grantees are hereby authorized to acquire the ownership or use or control, by purchase, lease, agreement or otherwise, of the pipes and property of the Kansas City Missouri Gas Company, the consent of the city being hereby given to said company, its successors and assigns, to make such transfer, lease or disposition of its pipes and property to the grantees, and during the time the pipes and property of said company shall be in the possession or under the control of the grantees, said company, its successors and assigns, shall be relieved of any obligation to supply manufactured gas (provided, however, that no consumer of manufactured gas shall be deprived thereof by anything done under this section until such consumer can obtain natural gas from grantees), but the acquirement by the grantees of such ownership or use or control of the pipes and property of the Kansas City Missouri Gas Company, shall be subject to the right of the city to purchase the same under the special provisions of the several ordinances under which said company is now operating, and said right of purchase under said special provisions, shall apply not only to the pipes and property of the Kansas City Missouri Gas Company, as acquired by said grantees, but also to all other pipes and property owned by the grantees in Kansas City, Missouri, and used in connection with said plant, the value of such other pipes and property to be determined at the same time, in the same manner and in the

same proceedings. And grantees covenant that their contract for gas supply is with the Kaw Gas Company and The Kansas City Pipe Line Company (corporations), that under the terms thereof, after two years from the time the natural gas is first furnished to

74-30 Kansas City thereunder, the division of the gross income received for said gas between the distributing company and

the supply company shall be in the proportion of thirty-seven and one-half cents out of each dollar to the former, and sixty-two and one-half cents to the latter; and covenant for themselves, their successors and assigns, that none of the terms of that contract agreement shall be changed without consent of Kansas City expressed by ordinance; and grantees agree for themselves, their successors and assigns, that if Kansas City shall acquire said plant and property they will on demand transfer free of cost to Kansas City all their rights under said contract; and grantees further agree to procure from said two corporations and file with the City Clerk within ninety days from the time this ordinance becomes a law, a written agreement in form to be approved by the City Counselor, agreeing that they (said two corporations) will, if Kansas City shall acquire said plant as aforesaid, upon demand, furnish and continue to furnish during the remaining period of this franchise gas to Kansas City on the same terms as they have agreed to furnish it to the grantees, their successors and assigns. If said proposed within agreement to be made by said two corporations is not filed with the City Clerk within the time specified this ordinance shall be null and void. Provided, however, that Kansas City agrees not to exercise the right to purchase the pipes and property of the Kansas City Missouri Gas Company, and of the grantees, under said special provisions, for the period of ten years from the time of the acceptance of this ordinance by grantees, unless grantees shall before the expiration of said period of ten years have ceased to furnish natural gas as required by this ordinance, in which event the right to make

74-31 such purchase under such special provisions shall be no longer postponed; in consideration whereof the grantees agree during all the time they may be supplying natural gas to bid annually,

(1) to fit the street lamp posts at present set and in place with incandescent equipment, to furnish natural gas to the same, and to maintain, repair, clean, light and extinguish the same, upon the all night schedule, for the price of not to exceed nine dollars (\$9.00) per lamp per annum; and

(2) to set, on the line of their mains, such additional street lamp posts as the Council may by ordinance demand, to connect the same, to furnish the same with incandescent equipment, to maintain, repair, clean, light and extinguish and to furnish the natural gas to the same, on the all night schedule, for the price of not to exceed twelve dollars (\$12.00) per lamp per annum; or at the option of the city, in lieu of such bidding, to furnish the natural gas free and without cost to the above and to additional posts that may be set by the city, at the rate of one hundred (100) lamps for each eight thou-

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sand (8,000) inhabitants, over and above two hundred thousand (200,000) inhabitants, population to be calculated for the purpose on the basis of two and one-half times the number of names shown by the city directory, having the largest circulation, including the names of business firms; and if the city elects to take natural gas free under this option, and to itself furnish or to contract with others for the incandescent equipment and for maintaining, repairing, cleaning, lighting and extinguishing, the city shall have the right to use for the purpose the posts at that time owned and set by the grantees, which the grantees agree shall not be less than the number which have been set and are now owned by the Kansas City Missouri Gas Company, and the city agrees that the lights shall be kept extinguished between sunrise and sunset.

Section 21. All prohibitions, amendments, forfeitures and obligations and all other provisions of this ordinance shall be binding upon the grantees, the survivors or survivor of them, and their or his assigns, whether expressly so stated herein or not; and all grants and privileges secured by this ordinance to said grantees shall be held to inure to the benefit of the survivors or survivor of them and his or their legal and bona fide successors and assigns. Nothing in this ordinance shall be construed as granting to said grantees any exclusive franchise, rights or privileges; but nothing herein shall be construed to neutralize or impair the provisions of this ordinance respecting the prohibition against the merger and consolidation.

Section 22. The said grantees shall not, except as in this ordinance provided, without the consent of the city, evidenced by ordinance, sell, lease or transfer their plant, property, rights or privileges, herein authorized, to any person, company, trust or corporation, now or hereafter engaged, or for the purpose of engaging in the manufacture or sale of gas in said city, under any other ordinance or franchise, or otherwise; and shall not without such consent at any time enter into any combination, with any person or persons, company or companies, authorized by ordinance to sell gas in said city, or with any person or persons, company or companies proposing by application for a franchise to sell gas to Kansas City or its inhabitants, concerning the rate or price to be charged for gas, to be used by the city, or private consumers; and no officer, employee or manager of the gas plant and works, to be constructed and acquired under and in pursuance of this ordinance, shall, at the same time, be in charge of, or be the officer, employee or manager of any other gas works authorized by ordinance to manufacture or sell gas in said city, except the Kansas City Missouri Gas Company, its successors and assigns, provided, however, that said grantees may convey all their rights and privileges herein granted to a corporation, its successors and assigns, to be organized by them, under the laws of the state of Missouri, for the purpose of acquiring, building, constructing and operating the gas plant authorized under this ordinance; but this shall not authorize any grantee to assign the franchise granted to it to any other company to which a franchise has been granted; and provided, further, that notice of said convey-

ance, and of any conveyance by said proposed assignee corporation, its successors or assigns, shall be filed with the City Clerk of Kansas City, Missouri, within ten (10) days after the execution thereof; and provided, further, that the grantees, or their assigns ("assigns" having the meaning above set forth), shall have the full, complete and unqualified right to assign and transfer and convey this franchise, and their property, by way of mortgage, deed of trust or other form of security in the nature of a mortgage or deed of trust, for the purpose of securing bona fide indebtedness, and for the purpose of acquiring property, and of raising funds to provide, build, construct, equip and operate said plant, and to conduct the business thereunder.

This section shall not be construed, however, in any way to prevent or hinder the grantees from taking over, for the purposes hereinbefore stated, the property or plant of the Kansas City, Missouri, Gas Company, and the taking over of the same shall never be construed as any violation of the provisions of this section 74-34 of this ordinance. And the grantees further bind themselves to enter into no pooling arrangements or any contract or merger or consolidation, either by way of a holding company, or otherwise, with any other company authorized by ordinance to manufacture or sell gas in Kansas City, except as permitted by this ordinance, and, as a matter of contract, hereby agree to obey all laws of the State of Missouri, and ordinances of Kansas City, now in existence or hereafter passed, in prohibition of mergers, consolidations and pooling.

It being the purpose to safeguard and make sure that there may always be competition in the matter of supplying gas and that gas will be supplied within the city, the grantees and assigns agree that any action on their part impairing or limiting or preventing such competition, or any substantial and continued failure for a period of sixty days to furnish gas in compliance with the provisions of this ordinance, shall constitute a violation of this ordinance, and the city shall have the right to repeal this ordinance by ordinance, and shall have the right to purchase the plant under the same terms and provisions stated in Sections 13 and 14 of ordinance of Kansas City, No. 6658, passed August 24, 1895, commonly known as the ordinance of the Kansas City, Missouri, Gas Company, but the statement of these particular remedies shall not be construed as taking away from the city any of its rights in law or equity.

Provided, the Kansas City Missouri Gas Company, and the grantees and the said corporation so to be formed by them are hereby expressly authorized to sell, lease, convey or otherwise dispose of their pipes and property of every kind, either to the other, and generally to make such contracts and agreements with each other as they may see fit, and said corporation so to be formed, its successors and assigns, may also, subject to the restrictions of this section, sell, lease, convey or otherwise dispose of its property and the franchise hereby granted, provided such action is taken subject to the terms of this ordinance. Kansas City retains to itself the right to itself own and operate a plant or plants for supplying the city, or the inhabitants thereof, with natural or

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artificial gas (if it shall at any time see fit so to do) for lighting and heating and manufacturing purposes, and to own and operate a plant or plants for supplying the city, or the inhabitants thereof, with any other sort of light.

Section 23. All ordinances or parts of ordinances in conflict with this ordinance are, in so far as they so conflict, hereby repealed. The form of the above ordinance is hereby approved.

EDWIN C. MESERVEY,
City Counselor.

Passed Sep. 27, 1906.

GEO. HOFFMANN,
President Upper House of the Common Council.

Passed Sep. 27, 1906.

D. R. SPALDING,
Speaker Lower House of the Common Council.

Approved Sept. 27, 1906.

H. M. BEARDSLEY,
Mayor.

Attest:

[SEAL.] WM. CLOUGH,
City Clerk,

By E. H. ALLEN,
Dpy.

74-36 STATE OF MISSOURI,
County of Jackson,
Kansas City, ss:

I, Wm. Clough City Clerk of Kansas City, Missouri, hereby certify that the annexed and foregoing is a true and correct copy of an ordinance of said City, No. 33887 entitled: "An ordinance Authorizing Hugh J. McGowan, Charles E. Small and Randal Morgan, the survivors or survivor of them, and their or his assigns, to lay, acquire and maintain pipes in Kansas City, for the purpose of supplying natural gas to said city and its inhabitants," approved September 27, 1906, as the same appears of record and on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of Kansas City aforesaid, this 5th day of Oct. A. D. 1906.

[SEAL.]

WM. CLOUGH,
City Clerk,
By E. H. ALLEN,
Deputy.

That Ordinance No. 33887 of Kansas City, Missouri, referred to in paragraph (2) of said stipulation is the ordinance attached to the contract set forth in the last preceding paragraph.

IV.

The order of court, Exhibit A attached to said stipulation, omitting title and formal parts, is as follows:

76

Order.

1. It is ordered by the Court that the Receiver and the distributing companies be and are hereby authorized to establish and put into force and effect in the several cities hereinafter named, the following schedule of minimum net rates to the consumer recommended by the Receiver for the sale of natural gas through the distributing companies in the several cities of Kansas and Missouri, to-wit:

76-1

Name of city.	Name of distributor.	Net rate to con- sumer per thousand cubic feet.
St. Joseph, Missouri.....	St. Joseph Gas Company.....	60
Weston, Missouri.....	Weston Gas Company.....	60
Atchison, Kansas.....	Atchison G. L. & P. Co.....	60
Leavenworth, Kansas....	Leavenworth L. H. & P. Co....	60
Tonganoxie, Kansas.....	Tonganoxie G. & E. Co.....	60
Lawrence, Kansas.....	Citizens L. H. & P. Co.....	60
Topeka, Kansas.....	Consumers L. H. & P. Co.....	60
Baldwin, Kansas.....	Baldwin Gas Co.....	60
Kansas City, Mo.....	Kansas City Gas Co.....	60
Kansas City, Kansas....	Wyandotte Co. Gas Co.....	60
Merriam, Kansas.....	Johnson County Gas Co.....	60
Lenexa, Kansas.....	Johnson County Gas Co.....	60
Olathe, Kansas.....	Olathe Gas Co.....	60
Gardner, Kansas.....	Gardner Gas Co.....	60
Edgerton, Kansas.....	Edgerton Gas Co.....	60
Wellsville, Kansas.....	Wellsville Gas Co.....	60
Ottawa, Kansas.....	Ottawa Gas & Elec. Co.....	60
Princeton, Kansas.....	Princeton & Richmond Gas Co..	60
Richmond, Kansas.....	Princeton & Richmond Gas Co..	60
Welda, Kansas.....	Anderson County Gas Co.....	60
Colony, Kansas.....	Anderson County Gas Co.....	60
Bronson, Kansas.....	Ft. Scott & Nevada L. H. W. & P. Co.	60
Moran, Kansas.....	Ft. Scott & Nevada L. H. W. & P. Co.	60
Ft. Scott, Kansas.....	Ft. Scott G. & E. Company....	60
Deerfield, Missouri.....	Ft. Scott & Nevada L. H. W. & P. Co.	60
Nevada, Missouri.....	Ft. Scott & Nevada L. H. W. & P. Co.	60
Thayer, Kansas.....	Thayer Gas Co.....	50

Name of city.	Name of distributor.	Net rate to con- sumer per thousand cubic feet.
Liberty, Kansas.....	Liberty Gas Company.....	50
Altamont, Kansas.....	American Gas Co.....	50
Oswego, Kansas.....	American Gas Co.....	50
Columbus, Kansas.....	American Gas Co.....	50
Scammon, Kansas.....	American Gas Co.....	50
Cherokee, Kansas.....	American Gas Co.....	50
Weir City, Kansas.....	Weir Gas Co.....	50
Pittsburg, Kansas.....	Home L. H. P. Co.....	50
Galena, Kansas.....	American Gas Co.....	50
Carl Junction, Mo.....	Carl Junction Gas Co.....	50

76-2		
Oronogo, Mo.....	Oronogo Gas Co.....	50
Joplin, Mo.....	Joplin Gas Co.....	50
Jasper County, Mo.....	Kansas Natural Gas Co.....	50
Independence, Kansas...	Kansas Natural Gas Co.....	30
Coffeyville, Kansas.....	Coffeyville Gas & Fuel Co.....	30
Elk City, Kansas.....	Elk City Oil & Gas Co.....	30
Parsons, Kansas.....	Parsons Natural Gas Co.....	35

County consumers served direct from the lines of the Receiver to be charged the same rates for gas as herein provided for consumers in the city situated nearest to them.

2. The foregoing net rates are not maximum rates and are authorized without prejudice to the rights of the distributing companies to establish, collect and receive any greater or more compensatory rates than those herein mentioned if the same can be done by agreement with the cities or otherwise, but the Receiver shall charge and collect as compensation for such gas so sold by such distributing company at such greater rate, a price equal to the below named percentage of the rate applicable to such distributing company herein above specified and authorized.

3. The Receiver and distributor shall charge and collect from each consumer a minimum bill of fifty cents (50c). The settlements between the Receiver and the distributing companies shall be made on or before the 15th day of the month. The receiver shall receive of the proceeds of the sale of gas and of the minimum bill and forfeited discounts, 57½%; and the distributing companies shall receive 42½%, except in St. Joseph, Missouri, where the Receiver shall receive fifty per cent (50%) thereof, and St. Joseph Gas Company, 50%; and the division of the proceeds of gas

76-3 sales at Fort Scott, Kansas, shall be as heretofore obtaining, to-wit: 50% to the Receiver; 25% to the Fort Scott and Nevada Light, Heat, Water and Power Company; 25% to the Fort Scott Gas & Electric Company; and at other cities on the Gunn Pipe Line the division shall be: 50% to the Receiver and 50% to the

Fort Scott and Nevada Light, Heat, Water and Power Company. In the event of failure of a consumer to pay for the gas furnished him as herein authorized, the Receiver and distributing companies shall discontinue the service to such consumer, after notice. Should the distributing company fail to make settlement promptly as directed, the Receiver may discontinue the service to such company. The Receiver and distributing companies are authorized to charge for the gas consumed by each consumer at a rate of 10% in excess of the net rate to the consumer on all bills not paid within ten days after due.

4. That if at any time it becomes necessary to supply gas on peak-load days or otherwise from the main trunk line or from wells now furnishing gas to the main trunk line or then capable of doing so, operated by the Receiver, to any of the distributing companies or cities above named which are selling gas at less than 50c. per thousand cubic feet, then and in that event the Receiver and distributing companies distributing gas in said city shall charge 75 cents net per thousand cubic feet for all gas furnished from the trunk line and distributed and sold in said city.

5. That the Receiver and all distributing companies discontinue the sale of all gas for use under boilers to make steam for power purposes, for use in brick plants, cement plants, glass plants, smelters and oil refineries after September 1st, 1917, until the further order of the Court.

76-4 6. The foregoing rates and the division thereof above provided for shall take effect and be in force for all gas sold and distributed by the distributing companies from and after special meter readings to be made by the distributing companies from September 1st to 10th, 1917, until further order of the Court.

7. That the Receiver uniformly apportion the gas to and among the various distributing companies supplied by him on the percentage basis of the number of meters in service in each city compared with the total number of meters in service supplied with gas from the Receiver's main pipe-line system from time to time.

8. It is further ordered that the Receiver shall maintain at the gates of the distributing companies' plants in each city and at the gates of the Gunn Pipe Line approved meters in good repair and shall carefully measure all gas delivered to each distributing company, and shall keep an accurate check on all gas sales reported by the distributor in order to ascertain the extent of leakage of gas. And if leakage exists in excess of the rate of 150,000 cubic feet per mile of three-inch main per year, in any distributing company's plant, or in said Gunn Pipe Line, he shall notify such company to repair its lines and reduce said excessive leakage, and if such company fail to reduce such leakage, he shall make application to the Court for an order in the premises, giving said distributing Company or said Gunn Pipe Line notice of the time when said application will be made.

9. It is suggested that each distributing company take immediate steps to inventory its plant with a view to having a valuation made thereof by a master to be appointed by the Court as one of 76-5 the bases for future changes in the schedule of rates herein.

10. The Intervenor herein, the Kansas City Pipe Line Company, and the Kansas City Gas Company and Wyandotte County Gas Company, appearing specially for this purpose only, object to the foregoing orders and each and all of them, and particularly the order fixing said 60c. rate and apportioning the same as aforesaid. Leave is hereby given to Kansas City, Missouri to make a special appearance in these causes for the purpose of objecting and excepting to this order. Pursuant to such leave, Kansas City, Missouri, now specially appears herein and objects and excepts to this order on the ground that its rights and interests are thereby adjudicated and determined adversely to it without due process of law in violation of the Constitution of the United States, and especially of Article 5 of the Amendments to the Constitution, which objections were by the Court overruled, to which ruling said parties except. Exceptions will be allowed to each of the Missouri defendants and each of the defendant cities in Kansas and the Public Utilities Commission of Kansas and any other party adversely affected by these rates.

WILBUR F. BOOTH,
Judge.

Filed Aug. 13, 1917.

77 V.

The order of court, Exhibit B attached to said stipulation, omitting title and formal parts, is as follows:

77-1 *Order.*

1. That the Receiver and the distributing companies be, and are hereby, authorized to establish and put into force and effect in the several cities hereinafter named, the following schedule of minimum net rates to the consumer for the sale of natural gas through the distributing companies in the several cities of Kansas and Missouri, to-wit:

77-2

Name of city.	Name of distributor.	Net rate to consumer per thousand cu. ft.
St. Joseph, Missouri.....	St Joseph Gas Company.....	80
Weston, Missouri.....	Weston Gas Company.....	80
Atchison, Kansas.....	Atchison Ry. L. & P. Co.....	80
Leavenworth, Kansas.....	Leavenworth L. H. & P. Co.....	80
Tonganoxie, Kansas.....	Tonganoxie G. & E. Co.....	80

Name of city.	Name of distributor.	Net rate to consumer per thousand cu. ft.
Lawrence, Kansas.....	Citizens L. H. & P. Co.....	80
Topeka, Kansas.....	Consumers L. H. & P. Co.....	80
Baldwin, Kansas.....	Baldwin Gas Company.....	80
Kansas City, Missouri...	Kansas City Gas Company.....	80
Kansas City, Kansas....	Wyandotte County Gas Co.....	80
Merriam, Kansas.....	Johnson County Gas Co.....	80
Lenexa, Kansas.....	Johnson County Gas Co.....	80
Olathe, Kansas.....	Olathe Gas Company.....	80
Gardner, Kansas.....	Gardner Gas Company.....	80
Edgerton, Kansas.....	Edgerton Gas Company.....	80
Wellsville, Kansas.....	Wellsville Gas Company.....	80
Ottawa, Kansas.....	Ottawa Gas & Electric Company.	80
Princeton, Kansas.....	Princeton & Richmond Gas Co..	80
Richmond, Kansas.....	Princeton & Richmond Gas Co..	80
Welda, Kansas.....	Anderson County Gas Company.	80
Colony, Kansas.....	Anderson County Gas Company.	80
Bronson, Kansas.....	Ft. Scott & Nevada L. H. W. & P. Co.	80
Moran, Kansas.....	Ft. Scott & Nevada L. H. W. & P. Co.	80
Ft. Scott, Kansas.....	Ft. Scott Gas & Electric Co....	80
Deerfield, Missouri.....	Ft. Scott & Nevada L. H. W. & P. Co.	80
Nevada, Missouri.....	Ft. Scott & Nevada L. H. W. & P. Co.	80
Thayer, Kansas.....	Thayer Gas Company.....	70
Liberty, Kansas.....	Liberty Gas Company.....	70
Altamont, Kansas.....	American Gas Company.....	70
Oswego, Kansas.....	American Gas Company.....	70
Columbus, Kansas.....	American Gas Company.....	70
Scammon, Kansas.....	American Gas Company.....	70
Cherokee, Kansas.....	American Gas Company.....	70
Weir City, Kansas.....	Weir Gas Company.....	70
Pittsburg, Kansas.....	Home Light, Heat & Power Co..	70
Galena, Kansas.....	American Gas Company.....	70
Carl Junction, Missouri..	Carl Junction Gas Co.....	70
77-3		
Oronogo, Missouri.....	Oronogo Gas Company.....	70
Joplin, Missouri.....	Joplin Gas Company.....	70
Jasper County, Mo.....	Kansas Natural Gas Company...	70
Independence, Kansas...	Kansas Natural Gas Company...	35
Coffeyville, Kansas.....	Coffeyville Gas & Fuel Co.....	35
Elk City, Kansas.....	Elk City Oil & Gas Company...	35
Parsons, Kansas.....	Parsons Gas Company.....	40

Country consumers served direct from the lines of the Receiver to be charged the same rates for gas as herein provided for consumers in the city situated nearest to them.

2. The foregoing net rates are not maximum rates and are authorized without prejudice to the rights of the distributing companies to establish, collect and receive any greater or more compensatory rates than those herein mentioned if the same can be done by agreement with the cities, but the Receiver shall charge and collect as compensation for such gas so sold by such distributing company at such greater rate, a price equal to the below named percentage of the rate applicable to such distributing company hereinabove specified and authorized.

3. The Receiver and distributor shall charge and collect from each consumer a minimum bill of fifty cents (50c.). The settlements between the Receiver and the distributing companies shall be made on or before the 15th day of the month. The Receiver shall receive of the proceeds of the sale of gas and of the minimum bill and forfeited discounts, 40%, and the distributing companies shall receive 60% except that the division of the proceeds of gas sales at Fort Scott, Kansas, shall be as heretofore obtaining, to-wit; 50% to the Receiver; 25% to the Fort Scott & Nevada Light, Heat, Water & Power Company; 25% to the Fort Scott Gas & Electric Company; and at other cities on the Gunn Pipe Line the division shall be: 50% to the Receiver and 50% to the Fort Scott & Nevada Light, Heat, Water & Power Company. At Independence, Coffeyville, Elk City, and Parsons, the present division shall remain, viz: 57½% to the Receiver, and 42½% to the distributing company. In the event of failure of the consumer to pay for the gas furnished him as herein authorized, the Receiver and distributing companies shall discontinue the service to such consumer, after notice. Should the distributing company fail to make settlement promptly as directed, the Receiver may discontinue the service to such company. The Receiver and distributing companies are authorized to charge for the gas consumed by each consumer at a rate of 10% in excess of the net rate to the consumer on all bills not paid within ten days after due.

4. That if at any time it becomes necessary to supply gas on peak-load days or otherwise from the main trunk line or from wells furnishing gas to the Main trunk line, operated by the Receiver, to any of the distributing companies or cities above named which are selling gas at less than 70c. per thousand cubic feet, then and in that event the Receiver and distributing companies distributing gas in said city shall charge 85c. net per thousand cubic feet for all gas furnished from the trunk line and distributed and sold in said city.

5. Except as authorized by special order, neither the Receiver nor any distributing company shall sell gas for use under boilers to make steam for power purposes, for use in brick plants, cement plants, glass plants, smelters, or oil refineries.

6. The foregoing rates and the division thereof above provided for shall take effect and be in force for all gas sold and distributed by the distributing companies from and after November, 1918, meter readings, except at Kansas City, Mo., where they shall become effective from and after meter readings made on or after November 20, 1918.

77-5 7. That the Receiver uniformly apportion the gas to and among the various distributing companies supplied by him on the percentage basis of the number of meters in service in each city compared with the total number of meters in service supplied with gas from the Receiver's main pipe-line system from time to time.

8. That the Receiver shall maintain at the gates of the distributing companies' plants in each city and at the gates of the Gunn Pipe Line approved meters in good repair, and shall carefully measure all gas delivered to each distributing company, and shall keep an accurate check on all gas sales reported by the distributor in order to ascertain the extent of leakage of gas.

9. This order, so far as it authorizes an increase of rates and a new percentage of division, is not mandatory upon the distributing companies, but is optional with each company. If the option is availed of by any company such action by it will be understood to be subject to the following conditions, to-wit: If it shall be finally determined judicially that consumers on the system of any distributing company are entitled to a refund of the whole or any part of this present increase of rates, such refund shall be borne by the respective distributing company and by the Receiver in the same proportion as they share, respectively, in the present increase of rates; and if the whole present increase is absorbed by the distributing company, said company shall bear the whole of any such refund.

10. Exceptions will be allowed to this order to any party to this suit adversely affected hereby.

(Signed)

WILBUR F. BOOTH,
Judge.

Dated, November 13, 1918.

78

VI.

The order of court, Exhibit C attached to said stipulation, omitting title and formal parts, is as follows:

79 Whereas, an order of this court, known as the Zone Rate Order, was made and entered herein July 14, 1919, approving certain rates to be charged by the Receiver of the Kansas Natural Gas Company for natural gas delivered by him to the various distributing companies at the gates of their respective cities; and it now appearing to the court that certain of the distributing companies, availing themselves of the provision of said order, have by formal application and otherwise, petitioned for the vacation or

modification of said order for reasons set forth at length in said applications; and it appearing further that the Public Utilities Commission of Kansas is at this time engaged in an investigation and inquiry touching the reasonableness of the rates now being charged or to be charged by said distributing companies to the consumers, and that one of the necessary elements of said rates is the amount paid or to be paid by said distributing companies to the Receiver for the supply of gas.

Now, therefore, for the purpose of affording to all parties interested an open inquiry as to what are reasonable city gate rates to be charged by the Receiver to the several distributing companies for gas furnished; and in the hope that such inquiry may be an aid both to said Public Utilities Commission of Kansas and to said distributing companies in their said investigation, but without
80 being binding upon them, it is hereby,

Ordered: That a hearing be had before a Special Master to be appointed by the court covering matters (to be more particularly specified in the order of appointment) touching the question of reasonable rates to be charged by the Receiver to said distributing companies for gas furnished them at their respective city gates. And in view of the representations of certain of said distributing companies that it is not possible for them (while upon the basis of the rates now being charged by them to their consumers) to pay to the Receiver the rates specified in said order of July 14th, 1919: it is further,

Ordered: That said order of July 14th, 1919, be and the same is hereby temporarily suspended during the said inquiry and investigation by said Public Utilities Commission of Kansas, and said hearing above mentioned before the Special Master, or until the further order of this court; and in lieu of the rates provided in said order of July 14, 1919, the following temporary schedule of net rates will be charged by the Receiver for natural gas delivered into the plants of the respective distributing companies at the measuring stations located at the connection between the distributing plant and the pipe line system operated by the Receiver, which are classified into Zones as follows:

	Price per Mc. ft.
Zone 1. Field Lines and Towns, applying to Independence, Coffeyville, Elk City and Parsons, Kansas.....	.20
Zone 2. Southern Trunk, applying to Liberty, Altamont, Oswego, Columbus, Scammon, Cherokee, Weir City, Pittsburg, Galena, in Kansas, and Carl Junction, Oronogo, Joplin and Jasper County, in Missouri.....	.26
Zone 3. Northern Trunk and Branches, applying to Thayer, Colony, Welda, Richmond, Princeton, Ottawa, Baldwin, Lawrence, Topeka, Tonganoxie, Reno, Leavenworth, Atchison, Le Loup, Wellsville, Edgerton, Gardner, Olathe, Lenexa, Merriam and Kansas City in Kansas, and Kansas City Mo. . .	.28

81 All gas to be measured on an eight (8) ounce basis, and on a temperature basis of 50 degrees Fahrenheit.

Country consumers served direct from the lines of the Receiver to be charged the same rates for gas as are charged city consumers in the city situated nearest to them. WILBUR F. BOOTH,

Judge.

Dated this 5th day of August, 1919.

82

VII.

Exhibit D to said stipulation of facts in evidence is as follows:

83

Office of John M. Landon,

Managing Receiver for Kansas Natural Gas Company.

Schedule of Rates for Sale of Gas by the Receiver of Kansas Natural Gas Company to Distributing Companies.

To all distributing companies supplying natural gas to all cities named below:

You will take notice that from and after the average meter reading date in August, 1919, and until further notice, the following schedule of net rates will be charged for natural gas delivered into the plants of the respective distributing companies at the measuring stations located at the connection between the distributing plant and the Pipe Line system operated by the Receiver, which are classified into zones as follows:

	Price per M cu.ft.
Zone 1. Field Lines and Towns, applying to Independence, Coffeyville, Elk City and Parsons, Kansas.....	.20
Zone 2. Southern Trunk, applying to Liberty, Altamont, Oswego, Columbus, Scammon, Cherokee, Weir City, Pittsburg, Galena, in Kansas, and Carl Junction, Oronogo, Joplin and Jasper County, in Missouri.....	.33
Zone 3. Northern Trunk and Branches, applying to Thayer, Colony, Welda, Richmond, Princeton, Ottawa, Baldwin, Lawrence, Topeka, Tonganozie, Reno, Leavenworth, Atheison, LeLoup, Wellsville, Edgerton, Gardner, Olathe, Lenexa, Merriam and Kansas City in Kansas and Kansas City, Mo. . .	.35

All Gas to be measured on an eight (8) ounce basis.

Country consumers served direct from the lines of the Receiver to be charged the same rates for gas as are charged city consumers in the city situated nearest to them.

Dated at Independence, Kansas, this 14th day of July, 1919.

JOHN M. LANDON,

Managing Receiver for Kansas Natural Gas Company.

84 The foregoing schedule having been presented to the court for approval, the same is hereby approved. However, at any time prior to July 25th, 1919, the court will receive suggestions in writing from interested parties. If good reasons appear for modifying this order, modification will be made. It is not feasible to have oral hearings.

WILBUR F. BOOTH,

Judge.

July 14th, 1919.

85

VIII.

Exhibit E to said stipulation of facts in evidence, omitting endorsements, is as follows:

86

Copy.

Filed 1-23-20.

354 Reinstated.

United States District Court, District of Kansas, First Division.

No. 1-N.

THE FIDELITY TITLE & TRUST COMPANY, Plaintiff,

vs.

KANSAS NATURAL GAS COMPANY et al., Defendants.

Consolidated with No. 1351, Equity.

There came regularly on for hearing on the 13th of October, 1919, a petition by John M. Landon, Receiver of the Kansas Natural Gas Company, praying for an order reinstating the order heretofore made on the 14th day of July, 1919, fixing a schedule of rates to be charged by the Receiver for the sale of gas delivered to the several distributing companies furnished by him at the respective city gates, which order of July 14th, 1919, was temporarily suspended by an order made August 5th, 1919. Said Receiver appeared in person, and by his attorneys, Chester I. Long, Esq., John H. Atwood, Esq., Robert Stone, Esq., and T. S. Salathiel, Esq., and certain of the distributing companies appeared by their attorneys, among them Kansas City Gas Company, Wyandotte County Gas Company, and Citizens' Light & Power Company, of Lawrence, by J. W. Dana, Esq., L. G. Treleaven, Receiver for Consumers Light, Heat & Power Company, of Topeka, Kansas, by F. L. Doran, Esq., and Atchison Railway Light, Heat & Power Company, by J. N. Challis, Esq.

Evidence was introduced and the matter held in abeyance pending the furnishing of certain items of evidence called for by the Distributing Companies. Said items of evidence were thereafter

furnished. A brief has also been submitted on behalf of the following Distributing Companies: Kansas City Gas Company, 87 Wyandotte County Gas Company; Treleaven, Receiver, Consumers' Light, Heat & Power Company; Atchison Railway Light & Power Company, Leavenworth Light, Heat & Power Company.

And the Court having considered the files and records and evidence bearing upon said matter, together with the arguments of counsel, hereby,

Orders, That the schedule of rates known as the 35-cent Zone Rate Order, made on the 14th of July, 1919, but which was temporarily suspended by an order made on the 5th of August, 1919, known as the 28-cent Zone Rate Order, is hereby reinstated and restored, to take effect on the 25th of March, 1920.

Ordered further, That the Receiver forthwith notify the various distributing companies served by him, by sending to each of them a notice in the form attached to this order.

WILBUR F. BOOTH,
Judge.

88 Office of John M. Landon, Managing Receiver for Kansas Natural Gas Company.

Schedule of Rates for Sale of Gas by the Receiver of Kansas Natural Gas Company to Distributing Companies.

To all distributing companies supplying natural gas to all cities named below:

You will take notice that from and after March 25th, 1920, and until further notice, the following schedule of net rates will be charged for natural gas delivered into the plants of the respective distributing companies at the measuring stations located at the connection between the distributing plant and the Pipe Line system operated by the Receiver, which are classified into zones as follows:

M cu. ft.

Zone 1. Field lines and towns, applying to Independence, Coffeyville, Parsons, and Tyro, Kansas.....	.20
Zone 2. Southern Trunk, applying to Liberty, Altamont, Oswego, Columbus, Scammon, Cherokee, Weir City, Pittsburg, Galena, in Kansas, and Carl Junction, Oronogo, Joplin and Jasper County in Missouri.....	.33
Zone 3. Northern Trunk and branches, applying to Thayer, Colony, Princeton, Welda, Richmond, Ottawa, Baldwin, Lawrence, Topeka, Tonganoxie, Reno, Leavenworth, Atchison, Leloup, Wellsville, Edgerton, Gardner, Olathe, Lenexa, Merriam, Fort Scott, Moran, Bronson, and Kansas City in Kansas, and Nevada, Deerfield and Kansas City, Mo. .	.35

All Gas to be measured on an eight (8) ounce basis, and on temperature basis of 60 deg. F.

Country consumers served direct from the lines of the Receiver to be charged the same rates for gas as are charged city consumers in the city situated nearest to them.

Dated at Independence, Kansas, this 20th day of January, 1920.

JOHN M. LANDON,

Managing Receiver for Kansas Natural Gas Company.

Approved:

WILBUR F. BOOTH,

Judge.

January 20th, 1920.

89

IX.

Exhibit F to said stipulation is as follows:

89-1 United States District Court, District of Kansas, First Division.

JOHN M. LANDON and GEORGE F. SHARITT, as Receivers of the Kansas Natural Gas Company, Plaintiffs,

vs.

THE COURT OF INDUSTRIAL RELATIONS of the STATE OF KANSAS et al., Defendants.

JOHN M. LANDON and GEORGE F. SHARITT, as Receivers of the Kansas Natural Gas Company, Plaintiffs,

vs.

THE COURT OF INDUSTRIAL RELATIONS of the STATE OF KANSAS (Substituted for the Public Utilities Commission of the State of Kansas); W. L. Huggins, Clyde M. Reed, and George H. Wark, as Members of the Court of Industrial Relations (Substituted for W. L. Huggins, C. W. Green, and John M. Kinkel, as Members of the Public Utilities Commission of the State of Kansas); Fred S. Jackson, as Attorney for the Public Utilities Commission of the State of Kansas; Richard J. Hopkins, as Attorney-General of the State of Kansas; Frank W. McAllister, as Attorney-General of the State of Missouri; Zach D. Patterson, as Counsel

89-2 of the Public Service Commission of the State of Missouri; William G. Busby, David E. Blair, Noah W. Simpson, Edward Flad, and Edwin J. Bean, as The Public Service Commission of the State of Missouri; Fidelity Title & Trust Company, a Corporation; Fidelity Trust Company, a Corporation; Delaware Trust Company, a Corporation; Kansas City Pipe Line Company, a Corporation; Kansas Natural Gas Company (Distributing Companies); St. Joseph Gas Company; The Union Gas and Traction Company; The Atchison Railway, Light and Power Company;

The Leavenworth Light, Heat and Power Company; The Tonganoxie Gas and Electric Company; The Citizens Light, Heat & Power Company; The Consumer's Light, Heat & Power Company; L. G. Treleven, Receiver, The Consumer's Light, Heat and Power Company; Kansas City Gas Company; The Wyandotte County Gas Company; The Olathe Gas Company; The Ottawa Gas and Electric Company; The Parsons Natural Gas Company; The Parsons Gas Company; The Elk City Oil and Gas Company; The American Gas Company; The Home Light, Heat and Power Company; The Carl Junction Gas Company; The Oronogo Gas Company; The Joplin Gas Company; The Weir Gas Company; Johnson County Gas Company; Wells-ville Gas Company; Weston Gas & Light Company; The Farmers Gas Company; Liberty Gas Company; The Kansas Gas & Electric Company; The Ft. Scott & Nevada Light, Heat, Water & Power Company; The Ft. Scott Gas & Electric Company, and John C. Cannon, Receiver of the Ft. Scott Gas & Electric Co.; The Coffeyville Gas & Fuel Company; The Kansas Farmers Gas Company; The Edgerton Gas Company; The Gardner Gas Company; The Baldwin Gas Company; The Ottawa Gas & Electric Company; The Richmond & Princeton Gas Company; The Anderson County Light & Heat Company; (Cities): St. Joseph, Missouri; Weston, Missouri; Atchison, Kansas; Leavenworth, Kansas; LeLoup, Kansas; Rosedale, Kansas; Bronson, Kansas; Moran, Kansas; Tonganoxie, Kansas; Topeka, Kansas; Lawrence, Kansas; Baldwin, Kansas; Ottawa, Kansas; Kansas City, Missouri; Kansas City, Kansas; Merriam, Kansas; Shawnee, Kansas; Lenexa, Kansas; Olathe, Kansas; Gardner, Kansas; Edgerton, Kansas; Wellsville, Kansas; Princeton, Kansas; Scipio, Kansas; Richmond, Kansas; Welda, Kansas; Colony, Kansas; Oakland, Kansas; Empire City, Kansas; Fort Scott, Kansas; Deerfield, Missouri; Nevada, Missouri; Thayer, Kansas; Parsons, Kansas; Elk City, Kansas; Independence, Kansas; Coffeyville, Kansas; Liberty, Kansas; Altamont, Kansas; Oswego, Kansas; Columbus, Kansas; Seammon, Kansas; Weir City, Kansas; Cherokee, Kansas; Galena, Kansas; Pittsburg, Kansas; Carl Junction, Missouri; Oronogo, Missouri; Joplin, Missouri; Defendants.

89-4

Decree.

This cause came on to be further heard at this term and it was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

First.

That those certain parties who brought suits in their individual behalf against The Kansas City Gas Company, claiming that said company has at certain specified times charged more than a legal and more than a reasonable price for gas, and praying for the fixing

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of legal and reasonable charges, for an accounting in reference to excessive charges and for an injunction against charging excessive rates, are not necessary parties to the present suit; their interest being represented either by the City of Kansas City or by the Public Service Commission of Missouri, and the motion of Kansas City Gas Company and the Receivers, to make them parties to this suit is denied. On motion of plaintiffs, this cause is dismissed as to the defendant Marnet Mining Company.

Second.

That the City of Kansas City, Missouri, is a proper party to the present suit, and its motion to dismiss is denied.

89-5

Third.

That the motion of the Court of Industrial Relations of the State of Kansas to dismiss this suit as to the distributing companies and not allow a hearing to said companies concerning the confiscatory character of the 28-cent rate order is denied.

Fourth.

That the rates in force on January 1, 1911, under Section 30 Chapter 238, Laws of Kansas 1911, for the sale of natural gas by the defendants distributing companies to consumers in the following places and at the prices named below:

Kansas Natural Gas Company, Independence, Kansas, 20 cents,
Elk City Oil & Gas Company, Elk City, Kansas, 25 cents,
The Coffeyville Gas & Fuel Company, Coffeyville, Kansas, 20 cents,

The Liberty Gas Company, Liberty, Kansas, 25 cents,
The American Gas Company, Altamont, Kansas, 25 cents,
The American Gas Company, Oswego, Kansas, 25 cents,
The American Gas Company, Columbus, Kansas, 25 cents,
The American Gas Company, Scammon, Kansas, 25 cents,
The American Gas Company, Galena and Empire, Kansas, 25 cents,

89-6 The American Gas Company, Cherokee, Kansas, 25 cents,
The Home Light, Heat and Power Company, (Kansas Gas & Electric Company, Lessee), Pittsburg, Kansas, 25 cents,
Parsons Natural Gas Company, Parsons, Kansas, 25 cents,
The Parsons Gas Company, Parsons, Kansas, 25 cents,
The Anderson County Light and Heat Company, Colony and Welda, Kansas, 25 cents,

The Richmond and Princeton Gas Company, Richmond and Princeton, Kansas, 25 cents,
The Ottawa Gas & Electric Company, Ottawa, Kansas, 25 cents,
The Baldwin Gas Company, Baldwin, Kansas, 25 cents,
The Citizens Light, Heat and Power Company, Lawrence, Kansas, 25 cents,

The Consumers Light, Heat & Power Company, (L. G. Treleaven, Receiver), Topeka and Oakland, Kansas, 25 cents,

The Tonganoxie Gas & Electric Company, Tonganoxie, Kansas, 25 cents,

Leavenworth Light, Heat & Power Company, Leavenworth, Kansas, 25 cents,

The Atchison Railway Light & Power Company, Atchison, Kansas, 25 cents,

The Edgerton Gas Company, Edgerton, Kansas, 25 cents,

Wellsville Gas Company, Wellsville, Kansas, 25 cents, LeLoup,

Kansas, 25 cents,

The Gardner Gas Company, Gardner, Kansas, 25 cents,

The Johnson County Gas Company, Merriam, Kansas, Shawnee, Kansas, Lenexa, Kansas, 25 cents,

89-7 Kansas Farmers Gas Company, Rural, 25 cents,

The Wyandotte County Gas Company, Kansas City, Kansas, 25 cents,

The Weir Gas Company, Weir, Kansas, 25 cents,

The Olathe Gas Company, Olathe, Kansas, 25 cents,

Ft. Scott Gas & Electric Co., Ft. Scott, Kansas, 30 cents,

Ft. Scott & Nevada Light, Heat, Water & Power Company, Moran, Kansas, Bronson, Kansas, 30 cents;

were, on December 10th, 1915, and thereafter, and still are, non-compensatory, unreasonably low, confiscatory and violative of the first clause of the Fourteenth Amendment to the Constitution of the United States.

Fifth.

That the proportional part of said rates being paid by said distributing companies to the Receiver of the Kansas Natural Gas Company on January 1, 1911, and subsequent thereto was non-compensatory to the Receiver and did not furnish the said Receiver a fair and reasonable return upon the property in his charge used and useful in furnishing said gas to said distributing companies.

Sixth.

That the order of December 10, 1915, of the Public Utilities Commission of Kansas prescribing rates for the sale of natural gas by the defendant distributing companies to consumers of gas in Kansas known as the "28-cent Rate Order" and the rates thereunder, 89-8 were on said date and still are, as to said distributing companies, non-compensatory, unreasonably low, confiscatory and violative of the Constitution of the United States.

Seventh.

That the proportional part of the rates prescribed by the 28-cent Rate Order, which was paid by said distributing companies to the Receiver of the Kansas Natural Gas Company during the time

said rate schedule was in force, was non-compensatory to the Receiver, did not furnish the said Receiver a fair and reasonable return upon the property in his charge and used and useful in furnishing said gas to said distributing companies, was confiscatory and violative of the Constitution of the United States.

Eighth.

That the preliminary injunction which issued out of this Court heretofore and on the 1st day of August, 1916, restraining and enjoining the Public Utilities Commission of Kansas and its members and its attorney, and the Attorney-General of the State of Kansas, from enforcing the statutory rates provided by Section 30, Chapter 238, Laws of Kansas, 1911 and from enforcing the rates provided by the order of the Public Utilities Commission of Kansas of December 10, 1915, known as the 28-cent Rate Order and from enforcing any of the penal provisions of the laws of Kansas for failure to maintain in effect such rates, or any of them, was properly, legally and providently issued and is made permanent.

Ninth.

That the following supply contracts under which gas was being supplied prior to the receivership herein by Kansas Natural Gas Company to the distributing companies, to-wit:

Contract between Kansas Natural Gas Company and Joseph J. Heim and Arnold Kalman, dated January 5, 1905, for a supply of gas for the cities of Topeka and Oakland, Kansas, now held by the Consumers Light Heat and Power Company, L. G. Treleven, Receiver;

Contract between Kansas Natural Gas Company and John A. Lambing and Otto Gerner, dated March 10, 1905, for a supply of gas for the towns of Altamont, Oswego, Columbus, Galena, Empire, Seamon and Cherokee, in the State of Kansas, and now held by the American Gas Company;

Contract between Kansas Natural Gas Company and Joseph J. Heim and Arnold Kalman, dated January 5, 1905, for a supply of gas for the city of Lawrence now held by the Citizens Light, Heat and Power Company;

Contract between Kansas Natural Gas Company and Morris Cliggett, Trustee, dated February 18, 1905, for a supply of gas for the City of Pittsburgh, Kansas now held by the Home Light, Heat and Power Company and Kansas Gas and Electric Company;

Contract between Kansas Natural Gas Company and the Weir Gas Company, dated February 18, 1905, for a supply of gas for Weir, Kansas, in which the Union Gas and Traction Company has an interest;

Contract between Kansas Natural Gas Company and C. H. Patterson, dated July 10, 1905, for a supply of gas for the City of Baldwin, Kansas, now held by the Baldwin Gas Company;

Contract between Kansas Natural Gas Company and C. H. Pattison, dated February 1, 1906, for a supply of gas for the City of Colony, Kansas, and contract between Kansas Natural Gas Company and C. H. Pattison, dated May 29, 1905, for a supply of gas for Welda, Kansas, said contracts now held by the Anderson County Light and Heat Company;

Contract between Kansas Natural Gas Company and C. H. Pattison, dated May 29, 1905, for a supply of gas to the City of Richmond, Kansas, and a contract between Kansas Natural Gas Company and C. H. Pattison, dated May 29, 1905, for a supply of gas for Princeton, Kansas, said contracts now held by the Richmond and Princeton Gas Company.

Contract between Kansas Natural Gas Company and C. H. Pattison dated February 1, 1906, for a supply of gas for the Cities of Merriam, Shawnee and Lenexa, Kansas, said contract now held by the Johnson County Gas Company;

Contract between Kansas Natural Gas Company and C. H. Pattison, dated May 29, 1905, for a supply of gas to the City of Edgerton, said contract now held by Edgerton Gas Company, and a contract between the same parties of the same date for a supply of gas for the Cities of Wellsville and Le Loup, Kansas, said contracts now held by the Wellsville Gas Company;

Contract between Kansas Natural Gas Company and the Kansas Farmers Gas Company, dated January 16, 1911, for a supply of gas to rural communities in Douglas, Johnson and Franklin Counties, Kansas;

Contract between Kansas Natural Gas Company and the Leavenworth Light and Heat Company, dated May 16, 1905, for a supply of gas to the City of Leavenworth, Kansas, now held by the Leavenworth Light, Heat and Power Company;

Contract between Kansas Natural Gas Company and C. H. Pattison, dated September 30, 1905, for a supply of gas to the City of Ottawa, Kansas, now held by the Ottawa Gas and Electric Company;

Contract between Kansas Natural Gas Company and C. H. Pattison, dated November 2, 1905, for a supply of gas to Tonganoxie, Kansas, now held by the Tonganoxie Gas and Electric Company.

Contract between Kansas Natural Gas Company and C. H. Pattison, dated July 12, 1905, for a supply of gas to Atchison, Kansas, now held by the Atchison Railway Light and Power Company;

Contract between the Peoples Gas Company and The Coffeyville Gas & Fuel Company, dated August 14, 1905, for a supply of gas to the City of Coffeyville, Kansas;

Contract between T. N. Barnsdall and the National Gas, Electric Light and Power Company, dated January 19, 1905, for a supply of gas to the City of Joplin, Missouri, now held by the Joplin Gas Company;

Contract between the Kaw Gas Company and C. H. Pattison, dated February 1, 1906, for a supply of gas to the City of Weston, Missouri, now held by the Weston Gas and Light Company;

Contract between Kansas Natural Gas Company and C. H. Patti-

son, dated June 27, 1905, for a supply of gas to Gardner, Kansas, now held by the Gardner Gas Company;

Contract between Prairie Oil & Gas Company and O. A. Evans and Company, dated November 4, 1905, for a supply of gas to Thayer, Kansas, now held by the Baxter Springs Gas Company and assumed by Kansas Natural Gas Company;

Contract between Kansas Natural Gas Company and Liberty Gas Company, dated October 12, 1909, for a supply of gas to Liberty, Kansas;

Contract between Kansas Natural Gas Company and the Olathe Gas Company, dated November 30, 1908, for a supply of gas to the City of Olathe, Kansas;

Contract between Kaw Gas Company and the Ft. Scott Gas and Electric Company, dated March 13, 1907, for a supply of gas to Ft. Scott, Kansas, and assumed by Kansas Natural Gas Company;

Contract between Kansas Natural Gas Company and the Central Gas Company and W. C. Gunn, dated July 29, 1911, for a supply of gas to Moran, Bronson, Kansas; Deerfield, Missouri, and

89-13 Nevada, Missouri; and contract between the same parties, dated May 1, 1910, for a supply of gas to the same community;

Contract between Kansas Natural Gas Company and Central Gas Company and W. C. Gunn, dated January 16, 1911, for a supply of gas to Nevada Missouri, said last three mentioned contracts now held by the Ft. Scott and Nevada Light Heat, Water and Power Company;

Contract between the Kaw Gas Company and the Carl Junction Gas Company, dated December 1, 1905, for a supply of gas for Carl Junction, Missouri, and assumed by Kansas Natural Gas Company;

Contract between the Kaw Gas Company and Oronogo Gas Company, dated December 1, 1905, for a supply of gas for Oronogo, Missouri, and assumed by Kansas Natural Gas Company;

Contract between the Kansas City Pipe Line Company and The Wyandotte Gas Company, dated February 1, 1905, for a supply of gas for Kansas City, Kansas, Rosedale Kansas and Wyandotte County, Kansas now held by the Wyandotte County Gas Company, and assumed by Kansas Natural Gas Company;

Contract between the Kansas City Pipe Line Company and McGowan, Small and Morgan, dated November 16, 1906, for a supply of gas for Kansas City, Missouri, and the contract between the same parties dated December 3, 1906, for a supply of gas to Kansas City, Missouri, now held by the Kansas City Gas Company and assumed by Kansas Natural Gas Company;

89-14 Contract between the Kaw Gas Company and St. Joseph Gas Company, dated August 30, 1905, for a supply of gas to St. Joseph, Missouri, and assumed by Kansas Natural Gas Company;

Contract between Kansas Natural Gas Company and the Leavenworth Light, Heat and Power Company, dated September —, 1912, heretofore existing between the Kansas Natural Gas Company or

its predecessors and the defendants distributing companies or their predecessors, are not binding upon the Receivers of the Kansas Natural Gas Company or upon the Kansas Natural Gas Company, and the defendants, the Public Service Commission of the State of Missouri, Frank W. McAllister, as Attorney-General of the State of Missouri, Zach D. Patterson, as counsel of the Public Service Commission of the State of Missouri, and William G. Busby, David E. Blair, Noah W. Simpson, Edward Flad and Edwin J. Bean, as members of the Public Service Commission of the State of Missouri, and their assistants or successors in office, and the Court of Industrial Relations of the State of Kansas, Richard J. Hopkins, as Attorney-General of the State of Kansas, Fred S. Jackson, as attorney for the Court of Industrial Relations of the State of Kansas, and W. L. Huggins, Clyde M. Reed, and George H. Wark as members of the Court of Industrial Relations, and the defendant cities of Kansas and Missouri, except the City of Kansas City, Missouri, are all permanently enjoined from enforcing the aforesaid supply contracts or rates fixed or referred to therein against plain-
 89-15 tiffs, Kansas Natural Gas Company or said distributing companies, and the defendant distributing companies are permanently enjoined from enforcing the said supply contracts or rates fixed or referred to therein against plaintiffs or the Kansas Natural Gas Company and its successors and assigns; and the City of Kansas City, Missouri, having in open court expressly disclaimed any intention of enforcing or attempting to enforce the supply contracts or either of them relating to Kansas City, Missouri, no injunction will run against said city in respect to said contracts.

Tenth.

That the defendants, the Court of Industrial Relations of the State of Kansas, (substituted for the Public Utilities Commission of the State of Kansas), and W. L. Huggins, Clyde M. Reed and George H. Wark, as members of the Court of Industrial Relations of the State of Kansas, and Fred S. Jackson as attorney for the Court of Industrial Relations of the State of Kansas, and Richard J. Hopkins, as Attorney-General of the State of Kansas, and their assistants or successors in office, and all other parties to this suit, and all of the agents, attorneys, servants and employees of each and all of them, are permanently enjoined and prohibited from putting into force or maintaining in effect, or attempting to put in force and maintain in effect by legal proceedings or otherwise, against L. G. Treleven, as Receiver of the Consumers' Light,
 89-16 Company, or other parties hereto, seeking the same relief as plaintiffs, the rates prescribed in the Commission's order of December 10, 1915, or the rates in force on January 1, 1911, prescribed by Section 30, Chapter 238, of the Laws of Kansas, 1911, for the sale or distribution of natural gas to consumers within the State of Kansas, and from enforcing or causing the enforcement of, by legal proceedings or otherwise, against L. G. Treleven, as

Receiver of the Consumers' Light Heat and Power Company, the Wyandotte County Gas Company, or other parties hereto seeking the same relief as plaintiffs, any penal provisions of Section 28, Chapter 238, of the Laws of Kansas, 1911, or any laws of the State of Kansas, on account of the failure or refusal by them, or either of them, to put into force or maintain in effect such rates, or any of them.

Eleventh.

That the rates to consumers fixed by the franchises and ordinances of the defendant cities of Missouri are adjudged to be unreasonably low and non-compensatory; but inasmuch as the rates now in force in the defendant cities of Missouri are rates fixed by the Public Service Commission of Missouri, and have superseded the rates fixed by franchise ordinances in said cities; and inasmuch as neither the Public Service Commission of Missouri nor said defendant cities of Missouri are now attempting to enforce any franchise ordinance rates, no injunction will run against either

89-17 the Public Service Commission of Missouri or against said cities. That the rates to consumers fixed by the franchises and ordinances in the defendant cities of Kansas are adjudged to be unreasonably low and noncompensatory, and all parties hereto are permanently enjoined from enforcing or attempting to enforce the same.

Twelfth.

The Court hereby retains jurisdiction of this cause and of the parties hereto for the further administration of the estate of Kansas Natural Gas Company and for the further purpose of a decision of and decree upon the issues raised by the supplemental pleadings of the several distributing companies filed against the Court of Industrial Relations of Kansas challenging its order dated August 18, 1920, and for the purpose of making such further orders as may be necessary for enforcing this decree and to protect the rights of the parties hereto.

It is further ordered that no one of the parties hereto shall recover his cost against any of the others.

WILBUR F. BOOTH,

Judge.

89-18 This decree is ordered entered at the request of Honorable Wilbur F. Booth District Judge, assigned to this district.

JOHN C. POLLOCK,

Judge.

Filed in the District Court on December 24, 1920.

F. L. CAMPBELL,

Clerk.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full, and correct copy of Decree entered in the case of John M. Landon, Receiver, et al. v. The Court of Industrial Relations of the State of Kansas, et al., No. 136-N.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka in said District of Kansas, this 27th day of December, 1920.

— — —
 Clerk.

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X.

Exhibit G to said stipulation is a supplemental petition of the Kansas City Gas Company filed with the Public Service Commission of Missouri in a certain cause then pending before said Commission, in which petition the Public Service Commission of Missouri is informed as to the following facts: (a) The making of the order of the United States District Court dated January 20, 1920, a copy of which order is set forth in paragraph VIII hereof; (b) A statement by the Kansas City Gas Company that it received by mail the notice hereinbefore set forth in paragraph VIII hereof; (c) The supplemental petition of the Kansas City Gas Company states in paragraphs 4 and 5 thereof, as follows:

"4. The Company further states that it desires to pay the Kansas Natural Gas Company and its receiver such a price for gas as will encourage the production of natural gas in the fields and the transportation thereof to Kansas City and favorably compete with other markets, and therefore this Company here now in and before the Commission offers to pay such price as this Commission finds may be necessary to procure an adequate supply of gas to enable this Company to meet the demands of its customers therefor on and after the schedule of rates hereinafter set forth takes effect; said gas to be pure natural gas of a merchantable character.

5. The Company further states that its schedule of rates filed in case 2327 on or about December 20, 1919, was based on the cost of gas to this Company at the city gates, of 28 cents per thousand cubic feet and an adequate supply thereof; that by reason of the increase in the cost of gas to this Company at the city gates as aforesaid, it is necessary to modify said schedule of rates so as to cover said increased cost by increasing the 'Service Charges, therein set forth and the Company hereby modifies its schedule so filed, and as so modified said schedule will read as follows:

Schedule of Rates.

Service Charge:

A monthly charge for service will be made depending upon the size of the meter required to supply the customer's demand, for each meter installed as follows:

Hourly cu. ft. capacity of meters.	Service charge.
90.....	.50
140.....	.75
230.....	1.00
375.....	1.25
475.....	1.50
Over.	Ratably.

91 Gas Charge:

A monthly charge for the natural gas will be made of 80 cents net per thousand cubic feet.

Collection Charge:

A collection charge of 10 per cent. will be added to all bills not paid within 10 days after due."

The prayer of said application is:

"Wherefore, the premises considered, the Kansas City Gas Company prays this Honorable Public Service Commission for relief and orders herein as follows:

(1) To authorize the Kansas City Gas Company to pay such price per thousand cubic feet for natural gas delivered at the city gates on and after the following schedule takes effect, as may be necessary to procure an adequate supply of gas to meet the demands of its customers therefor; said gas to be pure natural gas of a merchantable character.

(2) To authorize the Kansas City Gas Company to charge the following schedule of rates: (Same being a schedule sufficient to pay said increased city gates rate charged by the Receiver of the Kansas Natural Gas Co.)

Service Charge:

A monthly charge for service will be made depending upon the size of the meter required to supply the customer's demand, for each meter installed as follows:

Hourly cu. ft. capacity of meters.	Service charge.
90.....	.50
140.....	.75
230.....	1.00
375.....	1.25
475.....	1.50
Over.	Ratably.

Gas Charge:

A monthly charge for the natural gas will be made of 80 cents net per thousand cubic feet.

Collection Charge:

A collection charge of 10 per cent. will be added to all bills not paid within 10 days after due.

(3) And for such other and further orders and relief as to this Honorable Body may seem meet and proper in the premises."

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XI.

Exhibit H to said stipulation is an opinion and order of the Public Service Commission of the State of Missouri; said opinion, in so far as material, is as follows:

"On May 7, 1920, the Kansas City Gas Company filed the following supplemental petition: (Here Commission quotes portions of supplemental petition referred to in paragraph X hereof).

On the 14th day of July, 1919, the District Court of the United States for the District of Kansas, First Division, in charge of the Receivership of the Kansas Natural Gas Company issued an order known as the 35-cent zone rate order, directing the Receiver of said Company to charge the Kansas City Gas Company 35 cents per thousand cubic feet for natural gas at the city gates of Kansas City. On August 5, 1919, the said 35-cent zone rate order was temporarily suspended by the court, and thereafter upon petition of said Receiver and after full hearing, the Court ordered the reinstatement of the 35-cent rate to take effect on the 25th day of March, 1920, and the same has been in effect since that date.

The present rates of the Kansas City Gas Company to its consumers is a flat rate of eighty cents per thousand cubic feet of gas, with a fifty cent minimum charge which minimum charge will be discontinued by the Company upon the service charge mentioned in its supplemental petition becoming effective. The only change asked by the Company in its rates to the consumers is the substitution of the service charge for the present minimum charge. We are asked therefore at this time to make the following orders:

1. To authorize the Kansas City Gas Company to pay the producing company such a reasonable price as will enable it to compete with

other markets, secure a sufficient supply of natural gas and maintain an uninterrupted and efficient service.

2. To authorize said company to charge such rates as will meet its operating expenses, provide for depreciation, and pay a fair return on the value of its property actually used in the public service.

After due notice the case was heard by four members of the Commission at Kansas City, Missouri, on May 20, 1920, and has been briefed by Counsel for the Company and Kansas City, and now comes on for decision upon the entire record before us.

* * * * *

A memorandum opinion of Judge Booth of the United States Court in relation to his order reinstating the 35-cent City Gate Rate, offered in evidence by the Company, shows that the order was made after careful investigation and consideration by the Court, and we quote therefrom as follows:

93 "The order of July 14, was by its terms not to take effect until after the August, 1919 meter readings. Prior to the effective date a number of the distributing companies, pursuant to permission contained in the order, presented objections to the installation of the new rates * * *

"It was urged by the distributing companies that the 35-cent city gate zone rate order be vacated or that it be suspended and a temporary city gate rate be promulgated in its place. In view of these representations by the distributing companies, the Court issued an order August 5, 1919, temporarily suspending the order of July 14, and in its place promulgated a schedule of rates known as the 28-cent city gate zone schedule * * *

"On October 13, 1919, a petition by the Receiver was presented to the Court for a reinstatement of the 35-cent city gate zone rate order of July 14. A number of distributing companies appeared and took part in the hearing * * *

"The temporary 28-cent city gate zone rate has now been in effect something over five months. Returns for the four months, September-December, 1919, are available for study. Two facts stand out very prominently: (1) That the Receiver has not been able under said rate, to realize a reasonable return on the property used by him in distributing gas to the distributing companies, the net earnings over operating expenses and taxes being for the four months approximately only \$111,000. In making the computation, the cost of gas produced by the Receiver has been figured at the average price paid by him for gas purchased. (2) That the installation of a city-gate rate has resulted in a great diminution of leakage in the plants of distributing companies. The figures of the Receiver show that the leakage in the plants of the distributing companies during the four months ending December 31, 1919, when compared with the leakage during the same four months of 1918, has been reduced approximately 390,000,000 cubic feet.

'Attached to the memorandum submitted by counsel for the distributing companies is a table of figures purporting to show, if the 28-cent city gate zone rate had been in effect during the whole of the year 1919, that the net income of the Receiver would have been over \$677,000. One fundamental error is made in the calculation in assuming that the leakage during the first eight months of the year would have been the same in the plants of the distributing companies, even though the city-gate rate had been installed January 1, 1919, and that therefore, the sales of the Receiver to the distributing companies would have been during those eight months the same as the deliveries to them at the city gates actually were under the former method of charging. Experience during the last four months of the year has demonstrated the fallacy of this assumption. A revision of counsel's figures, made necessary by this fundamental error, will show that the net income of the Receiver after paying cost of gas and operating expenses and taxes would have been, on the 28-cent city-gate basis, for the year 1919 not over one-half the amount claimed by counsel. The same false assumption vitiates the conclusions of counsel as to the results which would have been reached under a 35-cent city gate rate; and the error is further accentuated by failing to recognize that the saving in leakage would have been reflected in decreased sales by the Receiver. It is true that the operating expenses for December 1918, were much higher than the average. But it is also true that the sales of gas for November and December were abnormally high, owing to the unusual scarcity and high price of coal.'

94 It is clear, we think, from the foregoing that the 35-cent City Gate rate promulgated by the United States Court is a just and reasonable rate and will not yield the Receiver more than a fair return on the value of the property used in the service. It also appears that keen competition exists for natural gas; That Oklahoma interests are demanding a greater share of the natural gas produced; that in order to open up new wells the rate must be made such as to attract new money; that if the Kansas City Gas Company does not pay a fair rate, the gas will be deflected to markets nearer the source of supply and will be used for power as well as domestic purposes. We will therefor permit the Kansas City Gas Company to pay said 35-cent rate to the Receiver for gas.

* * * * *

4. Conclusion—Rates Allowed.—

It thus appears that the 35-cent city-gate rate and also the rates to the consumers at Kansas City will not yield more than a reasonable return on the value of the property employed in the public service. It also appears that the average cost of natural gas to eighty-eight per cent of the domestic consumers of the Kansas City Gas Company, after adding the new service charge as proposed, will amount to but 91½¢ per thousand cubic feet, per month per consumer, a very reasonable rate considering the value of natural gas and the prevailing rates at this time for artificial gas. And it also

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appears that while the increased cost of gas to the Kansas City Gas Company for the year 1920 over the year 1919 will be approximately \$531,000.00, the increase in its earnings on account of the new service charges for the year will amount to only about \$441,000.00.

We will, therefore, permit the Kansas City Gas Company to pay said 35-cent City-Gate rate for natural gas and will approve the rates proposed for the Kansas City Gas Company to its consumers. In view, however, of the uncertainty of the gas consumption in the future and the probability that operating costs will change, we will authorize such rates to the consumers for a temporary period of thirteen months only from the effective date of the order herein with the requirement that the Kansas City Gas Company file verified quarterly reports with the Commission, and with reservation of jurisdiction in the Commission to change such rates at any time as conditions may require."

Following said opinion, the Public Service Commission entered its order, which, in so far as material, is as follows:

"Ordered: 1. That the Kansas City Gas Company cancel and withdraw its tariff filed December 20, 1919, entitled its 'P. S. C. Mo. No. 5', and that it be permitted to file in lieu thereof a new schedule of effective for a temporary period of thirteen months from July 1, 1920, containing the rates set out in its supplemental petition filed May 7, 1920, as follows:

95 Gas charge:

A monthly charge of 80¢ net per 1,000 cu. ft.

Service charge:

A monthly charge for service, depending upon size of meter required, for each meter installed as follows:

Hourly cu. ft. capacity of meters.	Service charge.
90.....	.50
140.....	.75
230.....	1.00
375.....	1.25
475.....	1.50
Over.....	Ratably

Collection charge:

10% on all bills not paid within 10 days after due.

Ordered: 2. That any increase of rates which the Kansas City Gas Company is authorized herein to charge its patrons shall remain in effect for a period of thirteen months only from and after July 1, 1920, at the end of which period such increase of rates shall without further order, cease, and the rates of said Company shall then be reduced and restored by said Company to the rates now on file or

charged by it; provided, that the Commission may hereafter at any time by further order continue such increase of rates for another or further period or otherwise change or modify the rates of said Company.

Ordered: 3. That the Kansas City Gas Company be required to keep true and accurate account of the amount of gas purchased and sold by it and of its revenue and expenses and file a full and accurate verified report thereof at the expiration of each period of ninety days after July 1, 1920, which report shall be in addition to any other reports required by law, and that the Commission fully retain jurisdiction of the parties and subject-matter of this case to continue, change or modify the rates of said Company at any time hereafter upon the evidence and facts now before the Commission or upon such further evidence as the Company or any interested party may offer.

Ordered: 4. That the Kansas City Gas Company be permitted to pay the Kansas Natural Gas Company or its receiver the 35-cent City-Gate rate for natural gas as provided in the order of Judge Booth mentioned in the report of the Commission herein, until otherwise ordered by the Commission."

96

XII.

Exhibit 2 offered in evidence is a certified copy of the articles of incorporation of the Kansas Natural Gas Company on file in the office of the Secretary of State of Missouri; the material parts of which are as follows:

"Third. The objects and purposes for which and for any of which this corporation is formed are, to do any or all of the things herein set forth to the same extent as natural persons might or could do, viz:

To produce, purchase and acquire natural gas; to pipe, convey and transport natural gas from the place or places where the same is produced, purchased or acquired, to such cities, towns, villages and places in the State of Kansas and Missouri, as may afford convenient and satisfactory markets for the same; to lay, maintain and operate, repair and remove such lines of iron and steel pipe as may be necessary or convenient in piping, conveying and transporting of natural gas; to lay such street mains and conduits as may be necessary to supply gas to consumers; to build, construct and operate such pump stations, compressor stations, tanks, machinery, gaso-meters, buildings, and structures as may be necessary or convenient in the production, transportation and supply of natural gas; to purchase, acquire, own and hold such real and personal estate, including rights-of-way, as may be necessary or convenient in connection with the construction and erection of the improvements aforesaid; * * *

XIII.

Exhibit 3 offered in evidence is a certified copy of the articles of incorporation of the Kansas Natural Gas Company on file in the office of the Secretary of State of Kansas; the material part of which is paragraph third reading the same as paragraph third of said articles on file in the State of Missouri, set forth in the last preceding paragraph.

XIV.

Exhibit 4 offered in evidence is a certified copy of the articles of incorporation of The Kansas City Pipe Line Company on file in the office of the Secretary of State of Kansas. To said exhibit the defendant made the following objection:

"(By Mr. Garver:) That concern is out of business, and has nothing to do with this controversy whatever, and I object to Exhibit 4 being received in evidence."

No ruling by the court.

The material parts of said exhibits are as follows:

"Third. The objects for which this corporation is formed are:

To prospect, drill, mine for and produce natural gas, and to transport the same by pipe lines or any other available means or method, and market and sell the same.

To take and hold rights and franchises for the sale, furnishing and transportation of natural gas.

To lay, build, and acquire by lease, purchase or otherwise, and afterwards to maintain and operate, pipe lines and mains for all sizes, kinds and descriptions necessary or convenient for the transportation of natural gas.

To purchase or otherwise acquire natural gas and to transport, pipe, market and sell the same to consumers thereof. * * *

XV.

Exhibit 5 offered in evidence is a certified copy of the articles of incorporation of the Kaw Gas Company on file in the office of the Secretary of State of Missouri. To said exhibit the defendant made the following objection:

"(By Mr. Garver:) I make the same objection to Exhibit 5 as I have made to Exhibit 4."

No ruling by the court.

The material parts of said Exhibit are as follows:

"III. The objects and purposes for which this corporation is formed are as follows:

(a) To prospect for, drill for, mine for and produce petroleum oil and natural gas, and the same to transport by pipe lines or any other available means or method, and to market and sell the same.

(b) To refine or manufacture petroleum oil into its several products, and to transport, market and sell the same.

(c) To take and hold rights and franchises for the sale, furnishing and transportation of natural gas, and to lay and maintain pipe lines and mains of all sizes, kinds and description necessary or convenient for the transportation of natural gas.

98 (d) To purchase or otherwise acquire natural gas and to transport, pipe, market and sell the same to consumers thereof. * * *

State of Missouri.

No. 1227.

Certificate & License.

Whereas, The Kaw Gas Company incorporated under the laws of the State of West Virginia has filed in the office of the Secretary of State duly authenticated evidence of its incorporation, as provided by law, and has, in all respects, complied with the requirements of law governing Foreign Private Corporations.

Now, therefore, I, John E. Swanger, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said The Kaw Gas Company is from the date hereof duly authorized and licensed to engage exclusively, in the State of Missouri, in the business of Prospecting, drilling, and mining for petroleum oil and natural gas, and transporting the same by pipelines or any other available means or methods, and marketing and selling the same; refining or manufacturing petroleum oil into its several products; taking and holding rights and franchises for the sale and transportation of natural gas and the laying and maintaining of pipelines and mains; and the purchasing or otherwise acquiring natural gas and the transportation, piping, marketing and sale of the same to consumers thereof, which is authorized by its charter, for a term ending April 13th, 1955, and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State, that the amount of the capital stock of said corporation is One Hundred Thousand Dollars, and the amount of said capital stock represented by its property located and business transacted in the State of Missouri is One Hundred Thousand Dollars; and that its public office for the transaction of business in Missouri is located at Joplin.

In testimony whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this 5th day of June, A. D. Nineteen Hundred and Five.

[SEAL.]

JNO. E. SWANGER,
Secretary of State.

By ————,
Chief Clerk."

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XVI.

Exhibit 6 offered in evidence is the certified copy of the acceptance of the Kansas City Gas Company of the order of the Public Service Commission of Missouri, and is as follows:

"June 16th, 1920.

I—We, Kansas City Gas Company hereby admit service on this date of a certified copy of an order of the Public Service Commission of Missouri, dated June 14, 1920, in the matter of 2231, 2263, 2327. The application for approval of new schedule of rates, Cases Nos. 2231, 2263 and 2327, the terms of which are accepted and will be obeyed.

SIGN HERE: KANSAS CITY GAS COMPANY,
By J. W. DANA,
General Counsel.

STATE OF MISSOURI,

Office of the Public Service Commission.

I have compared the preceding copy with the original on file in this office, and I do hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and seal of the Public Service Commission, at Jefferson City, this 15th day of May, 1922.

L. H. BREUER,
Secretary.

XVII.

Exhibit 7 offered in evidence is an application of the Kansas City Gas Company filed with the Public Service Commission of Missouri, on May 13, 1922, docket No. 3317, the material parts of which are as follows:

"1. That on the 14th day of June, 1920, this Honorable Body issued an opinion and order in case Nos. 2231, 2263 and 2327 consolidated, in which it fixed the city gates price for natural gas furnished by the Kansas Natural Gas Company to the Kansas City Gas Company at 35 cents per thousand cubic feet delivered at the city gates; that thereupon and thereafter the Kansas City Gas Company has paid said Kansas Natural Gas Company 35 cents per thousand cubic feet for said gas.

2. That on or about the first day of April, 1922, said Kansas Natural Gas Company notified this Company that on and after April, 1922, meter-readings, it would charge at the rate of 40 cents per thousand cubic feet for all gas delivered to this Company at the city gates; a true and correct copy of said notice being hereto attached, marked Exhibit A, and made a part hereof.

100 3. That on April 20, 1922, this Company notified said Kansas Natural Gas Company that it would accept and receive gas delivered by said Kansas Natural Gas Company into the mains of this Company on and after said April 1922 meter-readings only upon the express understanding that it would pay therefor at the rate of 35 cents per thousand cubic feet until the effective date of orders issued by the Public Service Commission of Missouri authorizing this Company to pay 40 cents per thousand cubic feet for such gas, or such other rate as the Commission may allow, and to charge its customers therefor sufficient rates to fully cover said increase; a true and correct copy of said notice being hereto attached, marked Exhibit 8, and made a part hereof.

4. That on April 25, 1922, said Kansas Natural Gas Company notified the Kansas City Gas Company that it would not furnish said gas at 35 cents per thousand cubic feet and that unless said Kansas City Gas Company agreed to accept and pay for said gas at the rate of 40 cents per thousand cubic feet on or before the first day of May, 1922, said Kansas Natural Gas Company would shut off and discontinue the supply of gas to said Kansas City Gas Company; a true and correct copy of said notice being hereto attached, marked Exhibit C, and made a part hereof.

5. That on April 26, 1922, said Kansas City Gas Company notified said Kansas Natural Gas Company that it would not agree to accept and pay for said gas at the rate of 40 cents per thousand cubic feet; a true and correct copy of said notice being hereto attached, marked Exhibit D, and made a part hereof.

6. That on April 29, 1922, a suit was commenced in the United States District Court for the Western Division of the Western District of Missouri, entitled "State of Missouri on relation of Jesse W. Barrett, Attorney-General of the State of Missouri, and the Public Service Commission of the State of Missouri, complainants, vs. Kansas Natural Gas Company, a corporation, defendant, No. 361 In Equity" and a restraining order was issued therein enjoining said Kansas Natural Gas Company from shutting off or discontinuing the supply of gas to said Kansas City Gas Company pending the further hearing of said cause, and that on May 4, 1922, said Kansas Natural Gas Company filed its answer in said cause; the bill of complaint, restraining order and answer in said cause, being hereby referred to and made a part hereof.

7. That said Kansas Natural Gas Company denies the jurisdiction of this Commission to fix and determine the city gates rate for gas furnished by it to the Kansas City Gas Company and refuses to

file its rates and charges with the Public Service Commission of Missouri in the manner provided by law, or to apply to the Commission or submit in any manner to the jurisdiction, power and control of the State of Missouri or the Public Service Commission of said state; and claims the right as an importer and vendor of gas to itself fix and determine the price and charge therefor; that the jurisdiction of this Commission over said Kansas Natural Gas Company and its rates, charges and practices must be determined by an appeal to the United States Supreme Court in the aforesaid case pending in the United States District Court for the Western Division of the Western District of Missouri; that said appeal and the final determination thereof will require at least two years' time; that during said time said five cent increase in the city gates price of gas will amount
101 to at least \$500,000.00; that if it is finally determined that said Kansas Natural Gas Company and its rates and charges are subject to the jurisdiction and laws of the State of Missouri and the orders of this Commission, then and in that event said increase will be unlawful and said demand upon the Kansas City Gas Company therefor will be non-enforceable at law; but if it shall be finally determined that said Kansas Natural Gas Company is not under the jurisdiction of this Commission and that it has the right to fix and determine its own charge for natural gas, said Kansas Natural Gas Company will have a claim and demand against the Kansas City Gas Company in excess of \$500,000.00.

8. That the Kansas City Gas Company is unable to pay said increase of five cents per thousand cubic feet at the present time, or said \$500,000.00 on the final determination of said cause, out of the income from the sale of said gas at the present schedule of rates heretofore approved and allowed by this Commission, to-wit, schedule P. S. C. Mo. No. 6, providing for an 80-cent gas rate and a 50-cent service-charge, hereby referred to and made a part hereof; that if said demands of said Kansas Natural Gas Company are legal and finally sustained said five cent increase will date from April 1922 meter-readings; that by reason thereof and in order to protect said Kansas City Gas Company from loss in the premises and to continue the service to the public of Kansas City, Missouri, pending the final adjudication and determination of the jurisdiction of this Commission it is necessary for said Kansas City Gas Company to increase its gas-rate from 80 to 85 cents per thousand cubic feet; and that by reason of the premises and the existing emergency the Company has filed with the Commission in the manner provided by law its P. S. C. Mo. No. 7, cancelling P. S. C. Mo. No. 6, as per copy hereto attached, marked Exhibit E, and made a part hereof; and that by reason of said emergency said schedule should take effect immediately and said rate should apply to all gas furnished on and after the April 1922 meter-readings.

9. The Kansas City Gas Company further states and shows to the Commission that it is not at this time earning a full and fair return under its present effective schedule of rates after paying said Kansas Natural Gas Company 35 cents per thousand feet for said

natural gas; that if it is finally determined judicially that said Kansas Natural Gas Company is entitled to charge and collect said 40 cents per thousand feet for said gas from and after April 1922 meter-readings, said schedule of rates now in force and effect is at this time and will continue to be during said litigation unreasonably low, non-compensatory and confiscatory of the property of this Company used and useful in the service of the public.

10. The Kansas City Gas Company here now offers to charge and collect said 5 cents additional per thousand cubic feet of gas sold by it and to hold the same in a reserve fund and to account for and return the same to each and every consumer in the amounts paid by said consumer, if and when it shall be finally and judicially determined that the demands of said Kansas Natural Gas Company upon the Kansas City Gas Company for said increase from 102 35 cents to 40 cents per thousand cubic feet for gas delivered on and after the April 1922 meter-readings were and are wrongful, unlawful and non-enforceable against said Kansas City Gas Company; or to make such other disposition of said fund so collected as this Honorable Commission may direct upon the final determination of the jurisdiction of this Commission in the premises.

11. The Kansas City Gas Company further states that notwithstanding that said Kansas Natural Gas Company denies the power, jurisdiction and control of this Commission over its plant, property and business in this state, said company is furnishing and delivering and selling natural gas within the State of Missouri to the Kansas City Gas Company and other gas corporations doing a public service business in this state and said Kansas Natural Gas Company is a public service gas corporation within the meaning of the Public Service Commission Act of this state and that said Company should be summoned and cited to appear before this Commission and show cause and justify its increase in the city gates rate for gas from 35 cents to 40 cents per thousand cubic feet.

Wherefore, the premises considered the Kansas City Gas Company prays this Honorable Commission as follows:

103 " (1) To enter an order approving said schedule P. S. C. Mo. 7 cancelling P. S. C. Mo. No. 6, now in force and effect,

and declaring that an emergency exists and that it is necessary in order to continue the natural gas supply and service to the public pending the final adjudication and determination of the jurisdiction of the Commission over the Kansas Natural Gas Company; that said schedule take effect forthwith and apply to all bills collected on and after June 1, 1922.

(2) To enter an order citing and summoning the Kansas Natural Gas Company to be and appear before the Commission on a day certain and show cause for and justify its increase in rates from 35 cents to 40 cents per thousand cubic feet for gas furnished the Kansas City Gas Company. * * *

The following exhibits were attached to said application Exhibit 7 in evidence:

Kansas Natural Gas Company.

(Letterhead.)

Bartlesville, Oklahoma, April 1st, 1922.

Kansas City Gas Company,
Kansas City,
Missouri.

GENTLEMEN:

You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces above atmospheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch.

Yours very truly,

KANSAS NATURAL GAS COMPANY,
(Signed) By H. L. MONTGOMERY.

103a Kansas City Gas Company.

Letterhead.

April 20, 1922.

Kansas Natural Gas Company,
Independence, Kansas.

Attention Mr. H. L. Montgomery.

DEAR SIR:

This is to acknowledge receipt of your communication reading as follows:

"Kansas Natural Gas Company.

Bartlesville, Okla., April 1st, 1922.

Kansas City Gas Company,
Kansas City, Missouri.

GENTLEMEN:

You are hereby notified that on and after April, 1922, meter reading you will be charged at the rate of forty cents per thousand cubic feet for all gas delivered to you at the town border measuring station, gas to be computed on a temperature basis of sixty degrees Fahrenheit, and a pressure basis of eight ounces above atmos-

pheric pressure, atmospheric pressure being assumed to be 14.41 pounds per square inch.

Very truly yours,

KANSAS NATURAL GAS COMPANY,

(Signed) By H. L. MONTGOMERY.

103b Replying will say that the foregoing is based upon the assumptions—

1. That the Kansas Natural Gas Company is not subject to the jurisdiction of the Public Service Commission of Missouri.
2. That it is not bound by contract, express or implied.
3. That it is free to change its rates and charges without the consent of the Kansas City Gas Company.
4. That it may shut off and discontinue the supply of gas at will.

The Kansas City Gas Company is advised by counsel that these assumptions are unfounded in law and in fact; that the Kansas Natural Gas Company in the delivery and sale of natural gas at Kansas City and within the State of Missouri is a public service gas corporation within the meaning of the Public Service Commission Act of Missouri and subject to the jurisdiction of the Public Service Commission of said State, and is a foreign corporation doing business in the State of Missouri and subject to all the statutes and laws of said State; that the Kansas Natural Gas Company is bound

103c by contract evidenced by the stipulation executed by said Kansas Natural Gas Company and Kansas City Gas Company dated April 29, 1920; the supplemental petition to the Public Service Commission filed May 3, 1920, pursuant to said stipulation for an order authorizing the Kansas City Gas Company to pay the Kansas Natural Gas Company 35 cents for gas at the city gates then demanded by said Kansas Natural Gas Company, and authorizing said Kansas City Gas Company to charge sufficient rates to the consumers to enable it so to do; and the order of the Public Service Commission of Missouri dated June 14, 1920, authorizing the Kansas City Gas Company to pay said Kansas Natural Gas Company said 35 cents city gates rate for natural gas and approving the schedule of rates filed with the Commission to enable it so to do, under which said contract the Kansas Natural Gas Company undertook and agreed with the Kansas City Gas Company to furnish gas delivered at the city gates at 35 cents per thousand cubic feet during such time as the rates applied for by the Kansas City Gas Company and allowed by the Public Service Commission of Missouri and accepted and put into effect by this Company should remain in force and effect, and that said contract is now and will continue to be binding upon said Kansas Natural Gas Company so long as said 103d schedule of rates on file with the Public Service Commission of Missouri continues in force and effect; that the Kansas Natural Gas Company may not change the city gates price for said gas without the consent of the Kansas City Gas Company; and that the Kan-

103e Kansas Natural Gas Company is conducting a business affected with the public interest and may not shut off or discontinue the supply of gas to the Kansas City Gas Company and its patrons without the consent and approval of the public authorities of the State of Missouri.

This is therefore to notify you that the Kansas City Gas Company will accept and receive gas delivered by the Kansas Natural Gas Company into the system of this Company at 25th and Genessee Streets and 39th and Stateline Streets, both within the State of Missouri, on and after April, 1922 meter-readings only upon the express understanding that it will pay therefor at the rate of 35 cents per thousand cubic feet until the effective date of orders issued by the Public Service Commission of Missouri authorizing this Company to pay 40 cents per thousand cubic feet for such gas, or such other rate as the Commission may allow, and to charge its customers therefor sufficient rates to fully cover said increase.

Yours very truly,
KANSAS CITY GAS COMPANY,
By C. W. GREEN,
General Manager.

103f Kansas Natural Gas Company.

Letterhead.

Bartlesville, Okla., April 25, 1922.

Kansas City Gas Co.,
Kansas City, Missouri.

Attention Mr. C. W. Green, General Manager.

DEAR SIR:

This will acknowledge your letter of the 20th, received today, in which you state that the Kansas City Gas Company will accept and receive gas delivered by the Kansas Natural Gas Company into the system of that Company at the 25th and Genessee Street Station and 39th and State-Line Streets, both within the State of Missouri, on and after the April, 1922, meter readings only upon the express understanding that it will pay therefor at the rate of 35c per thousand cubic feet until the effective date of orders issued by the Public Service Commission of Missouri authorizing that Company to pay 40c per thousand cubic feet for such gas.

You are hereby notified that the Kansas Natural Gas Company will not furnish you gas at 35c per thousand cubic feet and that unless it receives notice from you that the Kansas City Gas Company will accept and pay for gas at the rate of 40c per thousand cubic feet, as per our notice to you of April 1, 1922, on or before the 1st day of May, 1922, the Kansas Natural Gas Company will discontinue service,

Yours very truly,
KANSAS NATURAL GAS COMPANY,
By H. L. MONTGOMERY.

103g

Kansas City Gas Company.

(Letterhead.)

April 26, 1922.

Kansas Natural Gas Company,
Independence, Kansas.

Attention Mr. H. L. Montgomery, General Manager.

DEAR SIR:

This is to acknowledge receipt of your letter of April 25, 1922; replying, this is to notify you that the Kansas City Gas Company does not and will not consent or agree in writing or verbally, express or implied, by word, act, or deed, to accept and pay for gas at the rate of 40 cents per thousand cubic feet as per your notice of April 1, 1922, and stands upon its notice to you dated April 20, 1922, to accept and receive gas delivered by the Kansas Natural Gas Company only upon the express understanding that the Kansas City Gas Company will pay therefor at the rate of 35 cents per thousand cubic feet; and you must make your election whether or not to continue to furnish gas to the Kansas City Gas Company on the terms and conditions set forth in said letter of the Kansas City Gas Company to the Kansas Natural Gas Company dated April 20, 1922, or discontinue the service.

103h

And this is to further notify you that the Kansas City Gas Company will hold the Kansas Natural Gas Company liable in damages for the breach of its contract for a supply of gas as set forth and referred to in said letter of April 20, 1922, and will also hold said Kansas Natural Gas Company liable for all damages, loss, cost and expense incurred by the Kansas City Gas Company by reason of the discontinuance of the service and supply of natural gas to said Kansas City Gas Company by said Kansas Natural Gas Company if discontinued pursuant to your letter of April 25, 1922.

Yours very truly,

KANSAS CITY GAS COMPANY,
By C. W. GREEN,
General Manager.

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XVIII.

Exhibit 8 offered in evidence is a sample bill rendered by the Kansas Natural Gas Company to the Kansas City Gas Company, detailed statement of daily deliveries, remittance check and voucher for gas furnished by the Kansas Natural Gas Company to the Kansas City Gas Company for one month, as follows:

Independence, Kansas, March 31st, 1922.

Kansas City Gas Company,
906-910 Grand Ave.,
Kansas City, Missouri:

In Account with Kansas Natural Gas Company.

We charge you.

1922.

Mar. 31. Balance due 40,022.15

Mar. 31. For gas delivered you at City Gates during the
period from February 25th, to March 25th,
1922, as follows:

Thru all City Gas Meters, 484,023M,
@ 35¢ 169,408.05
209,430.20

Detailed statement attached.

Please make check payable to Kansas Natural Gas Company, and
mail promptly to Independence, Kansas.

105 Kansas City, Missouri.

The following is a statement showing amount due for gas de-
livered through all Meters No. —, Location —, County —,
during the periods as shown below, as per contract dated — —,
—, with The Kansas City Gas Company.

Copies to: — —.

(Signed)

V. C. JARBOE,
Supt. of Distribution.

Contract No. —.

1922.

Period covered.		Delivery, 8 oz. basis.	Remarks.
From—	To—		
February	26.....	16,622	.....
.....	27.....	17,688	.....
.....	28.....	19,483	.....
March	1.....	21,432	.....
.....	2.....	19,590	.....
.....	3.....	18,553	.....
.....	4.....	17,648	.....
.....	5.....	16,641	.....
.....	6.....	16,252	.....
.....	7.....	17,484	.....
.....	8.....	17,295	.....
.....	9.....	16,273	.....

Period covered.		Delivery, 8 oz. basis.	Remarks.
From—	To—		
.....	March 10.....	16,309	.....
.....	11.....	16,879	.....
.....	12.....	15,800	.....
.....	13.....	15,827	.....
.....	14.....	15,470	.....
.....	15.....	16,123	.....
.....	16.....	15,178	.....
.....	17.....	15,094	.....
.....	18.....	14,376	.....
.....	19.....	14,255	.....
.....	20.....	18,141	.....
.....	21.....	16,870	.....
.....	22.....	17,222	.....
.....	23.....	15,215	.....
.....	24.....	13,334	.....
.....	25.....	14,115	.....
		465,169	

Factor to correct for specific gravity and temperature flow
1.040531.

Total, 465,169 x 1.040531, 484,023, @ \$169,408.05.

Accounting Data, etc.

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(Copy of Check of K. C. Gas Co.)

(Face.)

Kansas City Gas Company.

Voucher, Check, No. 6888.

Kansas City, Mo., April 14, 1922.

Pay to the Order of Kansas Natural Gas Company \$166,150.25,
the sum of \$166,150 and 25 cts.

Endorsement of this check is accepted in full payment of in-
voices detailed on back.

KANSAS CITY GAS COMPANY.

Countersigned:

(Signed) C. W. GREEN,
Vice President.

(Signed) FRANK CARPENTER,
Asst. Secretary.

To Commerce Trust Co., 18-11 Kansas City, Mo.

(Back.)

In payment of the following invoices, no receipt necessary:
Date, 4-1-1922; Amount, 166,150.25.

(Copy of Voucher of K. C. Gas Co.)

Kansas City Gas Company, 908-910 Grand Avenue, Kansas City,
Missouri, to Kansas Natural Gas Company, Independence, Kan-
sas, Account Nat'l Gas Purchased.

Date.	Invoice.
-------	----------

4-14-22.	1099.	For gas received through measur- ing stations from February 25th, 1922, to March 25th, 1922, 474,715,000 cubic feet @ 35..	166,150.25
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(Rubber Stamp: Paid by check No. 6888, Apr. 14, 1922, on
Commerce Trust Co.)

Received — — —, 192-, from Kansas City Gas Company
One hundred sixty six thousand one hundred fifty and 25/100 dol-
lars in full for above bill.

\$166,150.25.

Per — — —,

Receipt and return to Kansas City Gas Company, Kansas City,
Mo.

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XIX.

Exhibit 9 offered in evidence is the check of the Kansas City Gas
Company to the Kansas Natural Gas Company dated June 14,
1922, for gas furnished from April 25 to May 25, 1922, together
with letter of Kansas Natural returning the same, as follows:

(Face.)

Voucher, Check, No. 7760.

Kansas City Gas Company.

Kansas City, Mo., June 14, 1922.

Pay to the Order of Kansas Natural Gas Company \$142,305.45,
the sum of \$142,305 and 45 cts.

Endorsement of this check is accepted in full payment of invoices on back.

KANSAS CITY GAS COMPANY.

Countersigned:

(Signed) C. W. GREEN,

Vice President.

(Signed) FRANK CARPENTER,

Asst. Secretary.

To Commerce Trust Co., 18-11 Kansas City, Mo.

(Back.)

In payment of the following invoices, no receipt necessary:
Date, 6-1-22; Amount, 142,305.45.

This check is tendered in full payment, accord and satisfaction for all gas furnished from April 25, 1922, to May 25, 1922, all stipulations, claims, demands, notices and court or commission orders to the contrary notwithstanding. Computed at 406,587,000 cubic feet at 35¢ per thousand cubic feet \$142,305.45.

The Empire Companies.

(Letterhead.)

Bartlesville, Okla., June 17, 1922.

Kansas City Gas Company,
Kansas City, Mo.

GENTLEMEN:

On advice of our Legal Department we are returning herewith your check #7760, dated June 14, 1922, for \$142,305.45, tendered to us for payment of gas furnished from April 25th to May 25th 1922, for the reason that the condition you have imposed is impossible of our acceptance.

The matter will be taken up further with you by our Legal Department.

Yours very truly,

KANSAS NATURAL GAS COMPANY.

V. B. DAY,

Asst. Treasurer.

Exhibit 10 offered in evidence is a certified copy of the order of the County Court of Jasper County, Missouri. To the reception of said exhibit in evidence the defendant objected as follows:

"(By Mr. Higgins:) We object to that as wholly immaterial and irrelevant to any issue in this case.

No ruling by the court. Said exhibit is as follows:

Certified Copy of Order.

STATE OF MISSOURI,

County of Jasper, ss:

Jasper County Court, May Term, 1903.

Be it remembered, That on the 21st day of July, 1903, in said Court, the following among other proceedings were had, to wit:

Now, on this 21st day of July, A. D., 1903, comes M. M. Sweetman and files and presents to the County Court his petition for an order granting to said M. M. Sweetman, his successors and assigns, power, authority and permission to lay, construct, maintain and operate pipes and pipe lines through, on, under and across the public roads, highways, bridges, ways and viaducts of Jasper County, Missouri, for the purpose of piping, conveying and transporting therein and thereby, natural and manufactured gas, oil and petroleum or either of said products, and the Board of County Commissioners, having examined the said petition, and being well advised on the premises, doth find that the power, authority and permission prayed for in said petition should be granted, wherefore, it is ordered that the said M. M. Sweetman, his successors and assigns be, and they are hereby granted and given the power, authority, right and permission to lay, construct, maintain and operate pipes, and pipe lines through, on, under and across the public roads, highways, bridges, ways and viaducts of Jasper County, Missouri, for the purpose of piping, conveying and transporting therein and thereby, natural and manufactured gas, oil and petroleum or either of said products. Provided: That said lines shall be constructed and operated so as not to inconvenience or endanger the public in the use of said highways, roads and bridges and provided that before the commencement of the construction or operation thereof, to file a bond in the sum of \$1,000.00 with the County Clerk of Jasper County, to indemnify the County of Jasper or any special road district in said County through which said pipe line may be laid or constructed, from damage, injury, loss or expense to any person or property, or to said road district, caused by the grantee in the construction and operation of said pipe line, or in paving or re-paving or repairing any road.

Court approved the bond of M. M. Sweetman, et al.

Record of County of Jasper County, Missouri, No. 29, at pages 109 and 110 thereof.

STATE OF MISSOURI,

County of Jasper, ss:

I, Chas. Davisson, Clerk of the County Court within and for the State and County aforesaid, hereby certify that the within and foregoing is a true copy of an order made by said County Court on the day and year above written, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Carthage, this the 12th day of May, 1922.

(Signed)

CHAS. DAVISSON,
Clerk.

[SEAL.]

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XXI.

Exhibit 11 offered in evidence, omitting formal parts, is as follows:

Affidavit of L. M. Thomas, Deputy Clerk County Court, County Clerk of Jasper County, Missouri.

STATE OF MISSOURI,
County of Jasper, ss:

L. M. Thomas, Deputy Clerk County Court being first duly sworn according to law, upon his oath deposes and says:

That he is the duly appointed, qualified and acting Deputy Clerk of the County Court of the County of Jasper, State of Missouri, and as such Deputy Clerk has charge of and custody over the records of said County Court; that this affiant took office as Deputy Clerk of the said County Court on the 1st day of January, 1919, and that prior to said date this affiant had been County Clerk, and in said Clerk's office was familiar with the business transacted by said County Court for a period of 19 years; that this affiant has made careful search of the files, minutes and records of said Jasper County Court for the purpose of ascertaining and determining what, if any, grants or orders have heretofore been made by said Court granting to any person or persons, firms or corporations, any right to lay pipe lines in, through or under the public roads in said County; that the only grant or order of such character which this affiant discovered in making said search was a certain order made on the 21st day of July, 1903, being the 24th day of the May term, 1903, of said Court, in which said order said Court granted to one M. M. Sweetman, his successors and assigns, the power, authority and permission to lay, construct, maintain and operate pipes and pipe lines through, on, under and across the public roads, highways, bridges, ways and viaducts of Jasper County, Missouri for the purpose of piping, conveying and transporting therein and thereby natural and manufactured gas, oil, and petroleum, or either of said products, said order being entered in Record 29, page 109, of said County Court.

And, therefore, this affiant says that to his best knowledge and belief there has never been made any order by the County Court of Jasper County, Missouri, granting to any person or persons, firm or corporation, any right or permission to lay or construct pipe lines in, through, under or across the public roads or highways of Jasper County, Missouri, for the purpose of distribution or transportation

of natural or manufactured gas, other than the grant to the said M. M. Sweetman above referred to.

(Signed)

L. M. THOMAS,
Deputy County Clerk.

[SEAL.]

Subscribed and sworn to before me this 24 day of May, 1922.

(Signed)

J. F. REIDHAAR,
Deputy County Clerk.

110

XXII.

Exhibit 12 offered in evidence, omitting formal parts, is as follows:

Affidavit of H. G. Packer.

STATE OF MISSOURI,
County of Jasper, ss:

H. G. Packer, of lawful age, being first duly sworn according to law, upon his oath deposes and says; that he resides at Royal Heights, a suburb of but not lying within the corporate limits of the city of Joplin, in Jasper County, Missouri, said Royal Heights being in said Jasper County, Missouri; that this affiant is a consumer and user of natural gas at his residence in said Royal Heights, and has been for a period of approximately eleven years; that affiant purchases and secures said natural gas from the Kansas Natural Gas Company, same being transported to affiant's residence through pipes laid under a public road adjoining affiant's residence; that affiant pays the bills for natural gas consumed at his said residence, monthly, to the Kansas Natural Gas Company at the office of said Kansas Natural Gas Company, being room 113 in Miners Bank Building, northwest corner of Joplin Avenue and Fourth Street, in the City of Joplin, Jasper County, Missouri; that this affiant is engaged in the automobile business in the city of Joplin and is familiar with the office of said Kansas Natural Gas Company; that there is painted upon a window in said office, fronting the hallway in said building, the words "Kansas Natural Gas Co."; that said office has been maintained at said place by said Kansas Natural Gas Company for a period of approximately eleven years, and is maintained there at the time of making this affidavit; that said Kansas Natural Gas Company carries its name in the telephone directory of the city of Joplin, being listed therein as follows:

Tel. No. 612—Kansas Natural Gas Co., r. 113 Miners Bank Bldg.

Tel. No. 193—Kansas Natural Gas Co., Warehouse, 518 E. 5th St.

that attached hereto and made a part of this affidavit is affiant's paid gas bill for gas consumed at affiant's residence in Royal Heights during the month of April, 1922; that said gas bill is identical excepting as to dates, amount of gas consumed and amount of bill, with monthly statements or bills which this affiant has received for gas consumed at his home during the time above mentioned; that all of affiant's

neighbors and all residents of Royal Heights with whom affiant is acquainted, purchase natural gas from the Kansas Natural Gas Company under the same conditions and in the same manner as affiant. And further affiant saith not.

(Signed)

H. G. PACKER.

Subscribed and sworn to before me, this 25th day of May, 1922.

(Signed)

RAY BOND,

Notary Public Within and for
Jasper County, State of Missouri.

[SEAL.]

My commission expires Aug. 21, 1924.

111 (Card Attached to Affidavit of H. C. Packer.)

Form 103 12-21 5M.

Telephone, 612.

Office Hours, 8:30 A. M. to 5 P. M. daily. Evenings Sat. before and on the 10th.

H. G. Packer to Kansas Natural Gas Company., Dr.

Miners Bank Building, Joplin, Missouri.

4/26. Meter Reading, 454,000 Feet.

3/26. Meter Reading, 449,000 Feet.

Gas consumed, 5,000 Feet @ 77¢ per 1000 Ft....	\$3.85
Less 7 per 1,000 cubic feet if paid on or before May 10th, 1922 .....	.35
	<hr/> \$3.50

This bill is due May 1st, 1922. If not paid on or before the 10th, gas may be shut off without further notice.

Positively no discount after the 10th.

If paid by check receipt will not be returned unless requested.

Please mail or bring this card to be receipted.

The Poplin Printing Co., Joplin, Mo. 86941.

(Rubber stamp on face: Kansas Natural Gas Company, Joplin, Mo. Received Payment May 4, 1922.)

Addressed on front: H. G. Packer, c/o Century Garage, Joplin, Mo.

Postmark: Joplin, Mo., May 1, 1922, 1:30 P. M.

Cancelled 1 cent stamp.

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XXIII.

Exhibit 13 offered in evidence is an affidavit of H. W. Sterling. To the reception of said exhibit in evidence the defendant objected upon the ground that the same was immaterial. There was no ruling by the court. The material parts of said exhibit are as follows:

Affidavit.

STATE OF MISSOURI,
County of Jasper, ss:

H. W. Sterling, of lawful age, being first duly sworn, upon his oath states that he resides in Duenweg, an unincorporated village in Jasper County, Missouri, a few miles east of the City of Joplin, and that he is engaged in business in said village, and that he uses natural gas both at his place of business and at his residence, and has been so doing for many years; that said gas is furnished to him at both places, and to many other customers in said village, by Kansas Natural Gas Company, which has for many years maintained an office in Miners Bank Building, City of Joplin, in said County, with a person in charge thereof, at which place bills for gas so used are paid, and that the attached exhibit is receipt issued by said company to this affiant for his gas bill for the month of February, 1921.

(Signed)

H. W. STERLING.

Subscribed and sworn to before me this 25th day of May, 1922.

My term expires Aug. 15, 1923.

(Signed)

H. W. BLAIR,

Notary Public.

[SEAL.]

Card attached to this affidavit in same form as in the last preceding paragraph.

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XXIV.

Exhibit 14 offered in evidence, omitting formal parts, is as follows.

Affidavit of H. J. Duffelmeyer.

STATE OF MISSOURI,
County of Jasper, ss:

H. J. Duffelmeyer, of lawful age, being first duly sworn according to law, upon his oath deposes and says; that he resides at Woodlawn, a suburb of but not lying within the corporate limits of the City of Joplin, Jasper County, Missouri, said Woodlawn being in said Jasper County, Missouri; that this affiant is employed in Joplin, Missouri, by the Citizens State Bank of said City; that he is a consumer and user of natural gas at his residence in said Woodlawn, and has been for a period of approximately two and one-half years; that affiant purchases and secures said gas from the Kansas Natural Gas Company, same being transported to affiant's residence through pipeline laid under a public alley adjoining affiant's premises; that affiant pays the bills for gas consumed at his said residence, monthly, to the Kansas Natural Gas Company at the office of said Kansas Natural Gas Company, being room number 113 in Miners Bank Building, northwest corner of Joplin avenue and Fourth street in said city of Joplin, Jasper County, Missouri; that affiant is familiar with the said office of said Kansas Natural Gas Company; that there is painted on

the window of said office fronting the hallway in said building, the words "Kansas Natural Gas Co."; that affiant is personally acquainted with the man in charge of said office, his name being J. F. Carpenter; that said office is now and has for a long period of time, been maintained by said Kansas Natural Gas Company at said place; that said Kansas Natural Gas Company carries its name in the telephone directory of the city of Joplin; that attached hereto and made a part of this affidavit is affiant's said gas bill for natural gas consumed at his residence in Woodlawn during the month of December, 1921; that said paid gas bill is identical, excepting as to dates, amount of gas consumed and amount of bill, with the monthly bills or statements received by affiant for gas consumed at his said residence; that all of affiant's neighbors in Woodlawn purchase natural gas from said Kansas Natural Gas Company, in the same manner and under the same conditions as affiant. And further affiant saith not.

(Signed)

H. J. DUFFELMEYER.

Subscribed and sworn to before me this 24 day of May, 1922.

(Signed)

RAY BOND,

Notary Public Within and for Jasper County, Missouri.

[SEAL.]

My Commission expires Aug. 21, 1924.

Card attached to this affidavit in same form as one attached to Exhibit 12, affidavit of H. G. Packer.

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XXV.

Exhibit 15 offered in evidence is the original schedule of rates for gas filed by the Kansas Natural Gas Company by V. A. Hays, General Auditor, on November 1, 1913, with the Public Service Commission of Missouri. With respect to said exhibit being received in evidence, the following colloquy occurred:

"Mr. Higgins: That was filed prior to the decision by the Supreme Court of the United States in the case of Landon v. Caster, et al.?"

Mr. Dana: Oh, yes.

Mr. Higgins: We object to it, for the reason that it is wholly immaterial and foreign to any issue presented in this case. May I ask—are the rates fixed by this schedule, plaintiff's Exhibit 15, the rates that are now being charged by the Kansas Natural Gas Company.

Judge Lindsay: I can't say. I presume not; there's been none filed since.

Mr. Higgins: If your Honor please, the rate as fixed by this exhibit doesn't relate to the rates to Kansas City at all, I notice.

Judge Lindsay: That is immaterial.

Mr. Dana: I do not understand we are trying the Kansas City case only; it is the power of the Commission."

Said exhibit being as follows:

Rubber Stamp: Filed Nov. 1, 1913, by J. D. B., Public Service
Com. of Mo.

Form No. 14.

P. S. C. Mo. No. One, Cancelling P. S. C. Mo., No. —.

No supplement of this tariff will be issued except for the purpose
of cancelling the tariff.

Kansas Natural Gas Company.
Name of Corporation or Municipality.

*Schedule of Rates for Gas Applying to the Following Territory: All
of Jasper County Outside the Limits of Incorporated Cities and
Along Our Sixteen-inch Trunk Line Through Platte and
Buchanan Counties from the Missouri River to the City Limits
of St. Joseph.*

All of the rates shown in the attached classification are now and
have been in force for several years.

Issued Prior to April 15, 1913, Effective April 15th, 1913.
Month, Day, Year. Month, Day, Year.

By V. A. Hays, General Auditor,
Name of Officer. Title.

Independence, Kansas.
Address of Officer.

Independence, Kansas, Kansas Natural Gas Co.

Form No. 14.

Original Sheet No. 1.

P. S. C. Mo. No. One, Cancelling P. S. C. Mo. No. —.

Kansas Natural Gas Company.
Name of Issuing Corporation or Municipality.

Classification of Service.

Schedule of Rates.

Illuminating Gas:

In Alba, Neck City and Purcell, the rate is twenty-seven (27)
cents per thousand cubic feet, subject to a discount of two (2) cents
per thousand cubic feet if paid by the tenth of the month following

that in which the gas is used. In the balance of Jasper County, the rate is twenty-five (25) cents net.

Fuel Gas:

Same as Illuminating Gas. All Gas furnished for "Illuminating" and "Fuel" is measured through one meter.

Power Gas (Gas Engines):

The rate for gas engines is twenty-five (25) cents net per thousand cubic feet for the first one million (1,000,000) cubic feet consumed in any one month at one place, and fifteen (15) cents per thousand cubic feet for all above that quantity.

Power Gas (Boilers):

The rate for boiler gas is fifteen (15) cents per thousand cubic feet subject to a discount of two and one-half ($2\frac{1}{2}$) cents per thousand cubic feet if paid by the tenth of the month following that in which the gas is used. This rate only applies to gas used to make steam for power purposes and is in effect during the summer months only.

Street Lighting:

The rate for street lamps is twenty-five (25) cents per month per lamp. We estimate the consumption of a street light at one thousand (1,000) cubic feet per month.

NOTE.—All the above rates are for Natural Gas, which is the only kind we furnish.

Date of issue: Prior to April 15, 1913; date effective: April
Month, Day, Year. Month

15, 1923.

Day, Year.

Issued by V. A. Hays, General Auditor, Independence, Kansas
Name of Officer. Title. Address.

116 Here appeared three special forms of contract as follows:

Low pressure domestic contract,
High pressure domestic contract,
Manufacturer's contract,

None of which are material here.

Form No. 14.

Original Sheet No. 2.

P. S. C. Mo. No. One, Cancelling P. S. C. Mo. No. —.

Kansas Natural Gas Company.
Name of Issuing Corporation or Municipality.

Rules and Regulations Applying on Contracts for Service.

This Company has no printed rules and regulations other than those shown in the three contracts attached hereto.

Date of issue: Prior to April 15, 1913; date effective: April
Month, Day, Year. Month,
15, 1913.
Day, Year.

Issued by V. A. Hays, General Auditor, Independence, Kansas.
Name of Officer. Title. Address.

XXVI.

Exhibit 16 offered in evidence is a contract between the Kaw Gas Company and the Carl Junction Gas Company. With respect to said Exhibit 16, the following objections were made by the defendant:

"(By Mr. Garver:) Same objection—we think it is immaterial for the purposes of this suit."

Said Exhibit 16, in so far as here material, is substantially the same as the contract between The Kansas City Pipe Line Company and McGowan, Small and Morgan, set out in paragraph II hereof.

XXVII.

Exhibit 17 offered in evidence is a contract between the Kaw Gas Company and the Oronogo Gas Company dated December 1, 1905. To which the defendant objected as follows:

"(By Mr. Garver:) We make the same objection. This was set aside by the same order."

Said Exhibit 17, in so far as material here, is substantially the same as Exhibit 16 referred to in the last preceding paragraph.

XXVIII.

Exhibit 18 offered in evidence is a report, finding an order of the Public Service Commission of Missouri upon the application of the Applin Gas Company for a change in rates. To which the defendant objected on the ground that it was immaterial. Said exhibit, omitting formal parts, is as follows:

119 Before the Public Commission of the State of Missouri.

Case No. 2359.

In the Matter of the Application of THE JOPLIN GAS COMPANY for
Change in Rates.*Report.*

I.

The Joplin Gas Company engaged in supplying natural gas to its customers in the City of Joplin and adjacent territory filed an application with this commission on February 23, 1920, for permission to charge for gas service under a so-called 3-part rate. An intervening petition was filed by the City of Joplin on March 4, 1920.

Due notice, having been given, the case was heard at Joplin by two of the Commissioners on the 24th day of March, 1920. A further hearing was held at Jefferson City on the 28th day of June, 1920. At the conclusion of this hearing, the case was submitted on the evidence, proper time being given for filing briefs.

Upon receipt of a telegram from the Joplin Gas Company, under date of August 25, 1920, calling attention to the abnormally high operating expenses for April, May, June and July, and requesting a conference, a further hearing in the case was held, after due notice, at Jefferson City on August 30, 1920. Further exhibits were introduced by the Joplin Gas Company. The City of Joplin did

120 not appear at this hearing but a statement was filed on behalf of the City by Ray Bond, City Attorney. The case now comes on for decision on the record.

II.

The Joplin Gas Company owns the distribution system in the City of Joplin. It has been supplying natural gas to its customers since July, 1905. It does not produce any natural gas but ever since said date has obtained its natural gas from the Kansas Natural Gas Company, or its predecessor, until about December, 1922, when a receiver was appointed for said Natural Gas Company, and since that date it has been obtaining its supply of gas from said receiver, who is now acting as such receiver under appointment by the District Court of the United States for the Division of Kansas, First Division, the Receiver acting under the instruction and direction of said Court. Since August 25, 1919, the Gas Company has been paying to said receiver for the gas so received by it at the rate of twenty-six cents per 1,000 cu. ft. delivered to it at the border of the City of Joplin. An order has, however, been issued by said Court directing the Receiver to charge and collect, beginning March 25, 1920, at the rate of thirty-three cents per 1,000 cu. ft. of gas delivered at the city border.

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Since August 25, 1919, the Gas Company has been selling gas to its consumers in the City of Joplin and adjacent territory at the price of seventy cents per 1,000 cu. ft. or at the option of the consumer at the price of \$1.00 per month, customer's charge, 121 plus fifty cents per 1,000 cu. ft. for all gas used, all bills being subject to a penalty of ten per cent if not paid on or before the 10th day of the month in which said bills become due. Petitioner, the Gas Company, states "that while paying at the rate of twenty-six cents per 1,000 cu. ft. for gas so purchased by it and while selling gas at the rate hereinbefore stated, it has not been able to make an adequate return upon the value of its property used and useful in said business, after paying its necessary operating expenses, and that when the increased price for the gas to be purchased by it shall become effective, its returns will be still further reduced and its said charges to its customers will be still further insufficient and inadequate to afford it a fair and reasonable return upon the value of its property and its said rates will be non-compensatory and confiscatory."

Petitioner prays that it be allowed to charge for gas service according to one of the following schedule of rates:

Proposed Rates.

(a) Twelve Dollars per year per customer as a primary charge, (payable monthly).

An annual demand charge of 32¢ per cu. ft. of maximum hourly demand, (payable monthly).

A consumption charge of 35¢ per 1,000 cu. ft. for all gas delivered (payable monthly).

All of the above said charges to carry a ten per cent penalty if not paid on or before the 10th day of the month in which same become due.

(b) In case for any reason the Commission should deem the rate as provided for in (a) to be improper, unjust or unreasonable, petitioner requests that it be permitted to charge according to the 122 following schedule:

Twelve Dollars per year per customer as a primary charge.

Plus 60¢ per 1,000 cubic feet for all gas used.

The customer's charge to be paid in equal monthly installments as and when the charge for the gas itself is paid. Penalty provisions similar to those in Schedule (a) above.

(c) If for any reason the Commission should deem it improper, unjust or unreasonable, that the petitioner should be permitted to charge according to either of the Schedules (a) or (b) as above, petitioner prays that it be allowed to charge according to the following schedule:

One Dollar per 1,000 cu. ft. for all gas used (payable monthly).

Penalty provisions the same as in (a) above.

Interim Rates.

Petitioner prays that it be allowed to charge an interim rate effective March 25, 1920, and until one of the permanent rates above suggested shall be allowed, as follows:

One Dollar per month per customer as a primary charge.

Plus sixty cents per 1,000 cu. ft. for all gas delivered.

Payments to be made monthly and to carry penalty clause as in (a) above.

The intervening petition of the City of Joplin sets forth:

(1) That it is the duty of the Commission and within its jurisdiction to determine whether or not a wholesale rate for gas, all conditions and circumstances considered, is reasonable, and what part of said rates may be considered as a proper operating expense.

(a) That the 3-part rate as proposed by the applicant is an unjust, unfair and discriminatory rate regardless of the charges fixed for the three parts thereof; that the establishment of said method of charging for natural gas, especially to domestic consumers, will result in unjust and unlawful discrimination in favor of large consumers and against small consumers of gas; and that said method of charging for natural gas will result in impaired service and great inconvenience to the average consumer of gas.

(3) That the proposed charges will produce revenue in excess of what is necessary to yield applicant a fair return on its invested capital.

(4) That under the rates at present charged by applicant for natural gas in the City of Joplin said applicant is receiving more than a fair return on its invested capital; that said rates will in the future continue to yield a fair return and that the rates should be reduced instead of being increased.

(5) That the present rates which were by this Commission allowed to become effective as temporary and emergency rates should not be increased without a complete investigation into the value of applicant's property, used and useful, in supplying gas; into the income, expenses and business methods of said applicant, and into the reasonableness of the charges for gas to the distributing companies in Missouri by the Kansas Natural Gas Company.

(6) That the interim rates requested by applicant as well
124 as the rates suggested as alternatives for the 3-part rate are unjustly high and unfair and would yield an excessive return on the investment.

Wherefore, the City of Joplin prays that the Commission through its engineering and accounting experts have a complete inventory and appraisal made of the property of the applicant, and cause its books and records to be audited and examined, and its operating revenues and expenses to be determined, and that the Commission enter into a complete and thorough investigation of the whole question.

In the statement filed on behalf of the City of Joplin on August 30, 1920, objection is made to the filing of an increased interim rate on one day's notice as requested by the applicant. Reference is made to the fact that the earnings for the previous four months, although the company failed to meet its operating expenses, would not be convincing proof that the operation of the plant was not a profitable venture. It is further pointed out that although in September, 1919, the applicant failed to meet its operating expenses by the amount of \$1,740.57 and had a meagre income during the following July and August, nevertheless the amount available for return on investment and depreciation during the whole year, 1919, amounted to \$91,780.39. Renewed objection is made to the 3-part rate and it is suggested that if the customer's charge is allowed it should not exceed fifty cents per month, that being the charge allowed by this Commission in the Kansas City Gas case.

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Investment.

The Gas Company presents in Applicant's Exhibit No. 1 an inventory and appraisal of its property summarized as follows:

NOTE. Here follows summary of the physical property, totalling \$1,114,626.53.

It developed at the hearing that Items No. 4 "Coal Gas Apparatus" and No. 5, "Holder," amounting to \$42,531.50, represented property not used and useful at present. Prices for Items 2 to 6, inclusive, amounting to \$56,147.51 represent original cost depreciated. Prices for Items Nos. 7 to 11, inclusive, amounting to \$823,785.00, represent reproduction cost as of March 1, 1920, undepreciated.

According to the summary above, the total value, exclusive of going value, as claimed by the Gas Company is \$1,114,626.53.

In the brief filed by the applicant, it is suggested that a valuation of the property of the Joplin Gas Company on the basis of \$21,000 per mile of mains, which was the basis applied by this Commission as a check on reproduction cost in the Kansas City Gas Company's case, decided by this Commission on February 12, 1920, would result in a value of \$2,830,830 if applied to the equivalent 3-inch mileage or \$2,058,000 if applied to the actual mileage. The Company has 134.8 miles of equivalent 3-inch, and ninety-eight miles of actual mains.

126 The Joplin Gas Company has capital stock and funded and non-negotiable debt as follows:

Capital Stock, common	\$300,000.00
Funded Debt	300,000.00
Non-negotiable debt	326,154.56
According to the "Comparative General Balance Sheet"	
of Dec. 31, 1919, the fixed capital amounts to.....	962,156.87
Total assets and liability amount to.....	\$1,053,617.68

In the appraisal submitted by the Company the value of more than ninety per cent of the property is based upon reproduction cost

new as of March 1, 1920. Assuming that these values are fifty per cent in excess of the actual investment, we submit herewith a tentative and approximate valuation of the property based on the evidence, as follows:

NOTE. Here follows items making up value of physical property reduced as above, showing a total value of physical property aggregating \$793,000.00. Going value, \$80,000.00. Total value tangible property and going property amounting to \$873,000.00.

The Commission is unable to fix a definite value for rate-making purposes at this time, as no investigation has been possible by the engineers and accountants of the Commission, but taking into account all of the evidence available in this case, we will assume a tentative value of \$750,000 as the fair value of the property for rate-making purposes.

Revenues and Expenses.

127 According to Applicant's Exhibit No. 2, the revenues and expenses for the three years, 1917, 1918, and 1919, were as follows:

NOTE.—Tabulation shows for the year 1917:

Revenue	\$292,899.61
Expenses	229,415.82
Net Revenue	63,483.79
Non-operating income	1,967.73
Amount available for return on investment and depreciation reserve	65,451.52

Tabulation shows for the year 1918:

Revenue	\$224,018.50
Expenses	166,472.03
Net Revenue	57,546.47
Non-operating income	1,359.04
Amount available for return on investment and depreciation reserve	58,905.51

Tabulation shows for the year 1919:

Revenue	\$295,047.70
Expenses	205,117.14
Net Revenue	89,930.56
Non-operating income	1,849.83
Amount available for return on investment and depreciation reserve	91,780.39

(d) As estimated, for 12 months beginning April, 1920, with present rates:

According to Applicant's exhibit termed "Smith's Exhibit, No. 2", the revenue and expenses for twelve months beginning April, 1920, when the Gas Company commenced paying 33¢ per 1,000 cu. ft. of gas, are estimated as follows:

Revenue for 12 mos. after paying for gas at the rate of 33¢ per 1,000.....	\$62,933.12
Operating expenses assumed same as for year, 1919..	60,816.00

Estimated amount available for return on investment & depreciation reserve for 12 mos. with rates in effect at present.....	\$2,117.12
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128 (e) As estimated for 12 mos. with 3-part rate as proposed:

Revenue.

Service charge, 5,600 consumers @ 12.00 per year...	\$67,200.00
Demand charge, 5,600 consumers with average of 50 cu. ft. hourly demand @ 32.00 per 100 cu. ft. hourly demand, or 5,600 times 16.00.....	89,600.00
448,000 M cu. ft. gas sold @ 35¢.....	156,800.00
Total Revenue	\$313,600.00

Expenses.

Kansas Natural Gas Co.

80% of demand charge.....	\$71,680.00
448,000 M cu. ft. gas @ 22¢.....	98,560.00
	\$170,240.00

Leakage, above amount allowed:

Total Leakage for 1919.....	278,000 M cu. ft.
Leakage allowed	28,254 " " "
	249,740

249,746 M. Cu. Ft. @ 22¢.	54,944.00
Operating expenses as in 1919.....	60,816.00
	\$286,000.00

Estimated revenue	\$313,600.00
Estimated expenses	286,000.00

Am't Available for return on investment & depreciation reserve	\$27,600.00
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(f) As estimated, for 12 months, with \$12.00 per year customer's charge and 60¢ per M cu. ft. of gas:

Revenue.

Service charge, same as under (e) above.....	\$67,200.00
336,000 M cu. ft. of gas sold @ 60¢.....	201,600.00
Total revenue	<u>\$268,800.00</u>

Expenses.

568,000 M cu. ft. gas purchased at city gates @ 33¢	\$187,440.00
Operating expenses as in '19.....	60,816.00
	<u>\$246,256.00</u>

129 Amt. available for return on investment & depreciation reserve	\$20,544.00
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(g) As estimated, for 12 months with rate of \$1.00 per 1,000 cu. ft. gas for all gas sold:

5,600 consumers @ \$43.00 average.....	\$240,800.00
Cost of gas at 33¢ per 1,000 plus operating expenses..	<u>211,964.00</u>

Amt. available for return on investment & depreciation reserve	\$28,836.00
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We note from the above that for the last three years the Joplin Gas Company with an assumed tentative investment of \$750,000 had the following amounts available for return on investment and depreciation reserve:

Year, 1917	\$65,451.00 or 8.7%
Year, 1918	58,905.00 or 7.9%
Year, 1919	91,780.00 or 12.2%

and that the annual estimated amounts available in the future, under various assumptions are as follows:

With present rates in effect.....	\$2,117.00 or 0.3%
With proposed 3-part rate.....	27,600.00 or 3.7%
With proposed interim rate.....	20,544.00 or 2.7%
With proposed \$1.00 rate.....	28,836.00 or 3.8%

Under the 3-part rate, however, if the leakage can be brought down to normal the Joplin Gas Company will save \$54,944, giving it \$82,544 per year, or 11% available for return on investment and depreciation reserve in place of \$27,600 as above.

3-Part Rate.

The so-called 3-part rate represents an effort to assess charges for gas service so that each customer shall pay an amount directly proportional to the investment required for his particular service plus

his proportional amount of the operating expenses based on the quantity of gas used.

130 The first part of the rate, for which the gas company desires \$1.00 per month, represents the cost of reading meter, billing, collecting, bookkeeping and such expenses as are alike for each consumer, independent of his demand or consumption.

The second part, or the demand charge, for which the gas company desires 32¢ per — cu. ft. of maximum hourly demand, represents the return on the investment required, plus the depreciation reserve, plus taxes, divided by the total maximum demand.

The third part, for which the gas company desires 35¢ per 1,000 cu. ft. of gas sold, represents the amount of the operating expenses, including all labor and material divided by the total amount of gas sold.

This is a very similar form of rate to the rate which has for many years past been in effect for the sale of electric current, where a customer's charge and a primary demand charge are almost universally adopted, generally in a combined form, at least by the larger utilities. Water companies likewise have a demand charge based upon the size of meter required.

The City of Joplin offered fourteen affidavits of citizens of Ottawa, reciting their opinions of the 3-part rate which had been in effect in that city for a period of about three months. Dissatisfaction was expressed both with the service and with the cost under the 3-part rate.

Witness Hamilton for the gas company pointed out that the affidavits presented by the City of Joplin were made by parties who are using large amounts of gas for short periods, but had a small average consumption, and were, therefore, securing an unduly preferential rate under the flat rate plan, and further submitted

131 eleven exhibits representing eight working men, two retired farmers and one business man, which indicated that they were in favor of the 3-part rate, and were satisfied with the service.

Conclusion.

From a consideration of all of the evidence submitted in this case, the Commission concludes as follows:

1. That the Commission will not at this time pass upon the question of adopting the three-part rate but will await information as to the results attained in Ottawa, Kansas, and the towns supplied by the Wichita Natural Gas Company where the three-part rate is in effect.

2. That unless an increase in rates is allowed, the estimated amount available for return on the investment and depreciation reserve for the Joplin Gas Company for twelve months is \$2,117.00 or 0.3% on an investment tentatively assumed to be \$750,000.

3. That the Joplin Gas Company is entitled to relief and shall be permitted to file a schedule of maximum rates and charges effective October 1, 1920, pending the decision of the Commission as to the installation of the three-part rate, as follows:

Rates Allowed.

Service charge, 50¢ per month per customer, plus 70¢ per 1,000 cu. ft. for all gas used. Payments monthly, with ten per cent penalty clause as requested.

132 While it is impossible to predict, with accuracy, the net return which the gas company will receive from the rate as allowed above, it is believed that it will not exceed nine per cent for return and depreciation on an investment of \$750,000 even after the leakage of gas has been reduced to what might reasonably be considered allowable.

4. That the Joplin Gas Company shall proceed with all due diligence to repair and rebuild its distribution system and service connections so far as may be necessary to prevent an undue amount of leakage or a greater loss of gas than is normally allowable in property maintained — distribution systems.

5. That the Joplin Gas Company shall be required to file quarterly reports setting forth the income, operating expenses and return available, and that the Commission shall retain full jurisdiction of the matters and things herein involved for the purpose of issuing such further orders as may at any time to it appear desirable, upon the evidence then available.

An order will issue in conformity with the above.

EDWARD FLAD,
Commissioner.

All concur, except Simpson, C., absent.

133 Following is a copy of the order of the Public Service Commission of the State of Missouri, issued on the 23rd day of September, 1920:

Order.

It appearing that on February 23, 1920, the Joplin Gas Company made application to this Commission for permission to increase its rates and charges for Gas Service at Joplin, Missouri, and a hearing having been held and the case having been submitted and full investigation of the matters and things involved having been made, and the Commission on the date hereof having made and filed its report containing its findings of facts and conclusions thereon, which said report is hereby referred to and made a part hereof,

It is, after due deliberation

Ordered: 1. That the Joplin Gas Company be and is hereby denied the rates and charges requested in its application filed February 23, 1920.

Ordered: 2. That the Joplin Gas Company be and is hereby permitted to put into effect October 1, 1920, pending the decision of

the Commission as to the installation of the three-part rate, the following schedule of maximum rates and charges:

Service charge, 50¢ per month per customer.

For all gas consumed per 1,000 cu. ft. 70¢

Payments monthly, with ten per cent penalty clause.

134 Ordered: 3. That the said Joplin Gas Company shall be required to file quarterly reports setting forth the income, operating expenses and return available and that the Commission retain full jurisdiction of the matters and things involved for the purpose of issuing such further orders as may at any time to it appear desirable, upon the evidence then available.

Ordered: 4. That the said company shall proceed with all due diligence to repair and rebuild its distribution system and service connections so far as may be necessary to prevent any undue amount of leakage or a greater loss of gas than is normally allowable in properly maintained distribution systems.

Ordered: 5. That this order shall take effect on October 1, 1920, and that the Secretary of the Commission shall forthwith serve upon the parties hereto a certified copy of this order, and that the said Company shall on or before the effective date of this order notify the Commission in the manner prescribed in Section 25 of the Public Service Commission Law, whether the terms of this order are accepted and will be obeyed.

By the Commission,
[SEAL.]

N. E. WILLIAMS,
Secretary.

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XXIX.

Exhibit 19 offered in evidence, omitting formal parts, is as follows:

Affidavit of L. H. Breuer.

L. H. Breuer, being first duly sworn, upon his oath states that he is the duly appointed, qualified and acting Secretary of the Public Service Commission of the State of Missouri, and as such the custodian of the records and files of said Public Service Commission and has knowledge of the proceedings had and orders made by said Public Service Commission, and affiant under his oath further states that no application has been filed or made by the Kansas Natural Gas Company or by anyone in its behalf to said Public Service Commission of the State of Missouri, for any order of said Commission authorizing or allowing said Kansas Natural Gas Company to increase the rates heretofore charged by it, for natural gas supplied to local distributing companies selling natural gas to consumers in cities and towns in the State of Missouri, and no evidence has been offered to the Public Service Commission of the State of Missouri by the Kansas Natural Gas Company, or by any other company or person, to inform or advise said Public Service

Commission as to the reasonableness or necessity of the claim or demand of said Kansas Natural Gas Company for an increase in the rate and price to be charged by it for natural gas furnished to local companies, selling and distributing natural gas in certain cities and towns in the State of Missouri, and particularly in the cities of Kansas City, Joplin, Oronogo and Carl Junction in the State of Missouri and said Public Service Commission of the State of Missouri has not been informed and is not advised, as to the reasonableness of or necessity for an increase in the price and rate to be charged by said Kansas Natural Gas Company, for natural gas supplied to local companies operating within cities of the State of Missouri.

(Signed)

L. H. BREUER.

The foregoing statement was sworn to and subscribed by the said L. H. Breuer, who is personally known to the undersigned, at my office in Jefferson City, in the County of Cole and State of Missouri, on this 16th day of May, 1922.

Witness my hand and official seal.

My term expires Jan. 15, 1925.

[SEAL.]

(Signed)

CARL TRAUERNICHT,

Notary Public in and for Cole County, Missouri.

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XXX.

The foregoing was all of the evidence introduced by the complainants and intervenor in support of the bill of complaint and the intervening bill of complaint of the Kansas City Gas Company. Thereupon, complainants and intervenor rested and the defendant Kansas Natural Gas Company announced to the court that it had no evidence to introduce, whereupon the taking of evidence was concluded.

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Certificate.

We, the undersigned solicitors for the appellants, do hereby certify that the above and foregoing is a full, true and complete statement of the evidence in the above entitled cause and contains all parts essential to the decision of the questions presented by the appeal herein, and is made under the terms and requirements of Equity Rule 75, for the purpose of perfecting the record on appeal.

Wherefore the premises considered, appellants move the court to approve the foregoing statement of the evidence.

JESSE W. BARRETT,

Attorney-General of Missouri.

L. H. BREUER,

JAMES D. LINDSAY,

Solicitors for Public Service

Commission of Missouri.

J. W. DANA,

Solicitor for Kansas City Gas Company.

Order.

The foregoing statement of the evidence is hereby approved this 14th day of November, 1922.

ARBA S. VAN VALKENBURGH,

Judge.

138 In the District Court of the United States for the Western Division of the Western District of Missouri.

In Equity.

No. 361.

STATE OF MISSOURI, on the Relation of JESSE W. BARRETT, Attorney-General of the State of Missouri, and Public Service Commission of the State of Missouri, Complainants,

vs.

KANSAS NATURAL GAS COMPANY, a Corporation, Defendant.

In Equity. Suit by State of Missouri on Relation of Attorney General and Public Service Commission against Kansas Natural Gas Company. The Kansas City Gas Company, intervener. Decree for defendant.

Jesse W. Barrett, Attorney-General of Missouri, and R. Perry Spencer, General Counsel, and James D. Lindsay, Assistant General-Counsel of the Public Service Commission, all of Jefferson City, Missouri, for the complainant.

H. O. Caster and R. D. Garver, both of Bartlesville, Oklahoma, and Richard J. Higgins, of Kansas City, Missouri, for the defendant.

J. W. Dana, of Kansas City, Missouri, for the intervener, the Kansas City Gas Company.

VAN VALKENBURGH, *District Judge* (orally):

Complainant, the State of Missouri, on the relation of the Attorney General of the State, and the Public Service Commission of the State, filed a bill of complaint against the Kansas Natural Gas Company praying a permanent injunction against said company, to restrain it from increasing the price of gas sold by it to local distributing companies in the state, to the extent of five cents per thousand cubic feet, over the rates heretofore in effect, without first procuring the consent and approval of the Public Service Commission. Such increase of five cents per thousand cubic feet, the Kansas Natural Gas Company has informed the distributing companies, would be effective after the so-called April Meter Readings of 1922. The Kansas Natural Gas Company also advised the distributing companies that unless they complied with the rates announced and fixed by them, they would discontinue supplying gas

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to the distributing companies. The Kansas City Gas Company, which purchases gas from the Kansas Natural and distributes such gas so purchased at Kansas City, filed its intervening petition herein and asked, among other things, the same relief as that prayed by complainant.

The defendant filed answers to the bill of complaint and the intervening bill, in which answers it asserts that it is engaged in the transportation of gas from the state of Oklahoma into and through the state of Kansas and into the state of Missouri; that such gas is sold by it in Kansas and Missouri, and that, therefore, its business is interstate commerce, and as such, is free from the regulation herein sought to be imposed. The three parties, complainant, intervener and defendant, have executed and filed an agreed statement of facts, which is supplemented by evidence of a documentary nature, introduced by complainant and intervener. The facts thus established in so far as they may be necessary to a decision of the points in controversy, are hereinafter sufficiently disclosed. Upon the record thus made, the cause is presented for final hearing upon the application for permanent injunction against the Kansas Natural Gas Company from

140 raising its rate five cents per thousand cubic feet at the gates of the cities, on the ground that the company has submitted itself, either directly or impliedly to the jurisdiction of the Public Service Commission, and that it has no right to raise that rate without first applying to the Commission, and then only subject to its orders with a right to review the commission's findings, on the ground that the same are confiscatory and unreasonable.

The whole question has been submitted to the court upon one proposition, i. e. the power of the Commission respecting this application.

The cases chiefly relied upon are the Landon case and the so-called Pennsylvania case, in the 249 U. S., at page 236, and 252 U. S., at page 23. The Landon case concerned itself entirely with the question of whether the right existed in the receivers of the Kansas Natural Gas Company to enjoin the utilities commissions and the municipalities from interfering with a raise of rates by a local distributing company; that was the real issue in that case. The Supreme Court had occasion to advert to some other principles involved, and the case becomes important, principally from that standpoint. The court said that the transportation and sale of gas through pipe-lines from one state to another is inter-state commerce, and that as a part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, "free from unreasonable interference by the state;" they were under no compulsion to accept an unremunerative price.

It has been stated and shown with respect to those conditional contracts, that conditions have been so materially changed that it is at least a matter of doubt, if not conclusively established, that those contracts as such are no longer binding as to the terms

141 imposed by them.

Some question is raised here as to what is meant by the expression "free from unreasonable interference by the state."

In the Pennsylvania Gas case, the court had to do with the gas company as a distributing agent. There, gas was distributed directly to the consumers in different cities and localities therein mentioned, by the pipe-line company, and the court held that when that was the situation the company came under the regulating power of the state, because what was done was a local intrastate business, and not interstate commerce, to which reference had been made in the Landon case; and they had occasion to differentiate the Landon case from the Pennsylvania case, which was then before the court; and it is not without significance that in deciding a question which came clearly within the local power, control and regulation of the state, it should have been thought necessary by the Supreme Court to point out the difference existing between the different classes of commerce, interstate as against intrastate.

The court says:

"We think that the transmission and sale of natural gas produced in one state, transported by means of pipe-lines and directly furnished to consumers in another state, is interstate commerce within the principles of the cases already determined by this court."

142 So we are left with no doubt as to the fact that this conclusively establishes that the transportation of natural gas from one state to another is interstate commerce, and that far we have no difficulty in reaching a final conclusion.

The court further said:

"The general principle is well established, and often asserted, that the state may not directly regulate or burden interstate commerce. That subject, so far as legislative regulation is concerned, has been committed by the Constitution to the control of the Federal Congress. But while admitting this general principle, it, like others of a general nature, is subject to qualifications not inconsistent with the general rule, which now are as well established as the principle itself. * * * In varying forms, this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352."

Now, it is significant that the court places the application of this principle upon the same basis as in the case of railroad regulation and transportation; so that we may have some light thrown upon the question by referring to the principles applicable to such cases. The Minnesota Rate Cases, of course, very exhaustively clear up the entire subject, and it is unnecessary to go to any other decided cases, in order to learn what the principles involved are, and to learn where the line of demarcation falls.

After stating the limitations, it was said in the Minnesota Rate Cases (Page 402):

143 "But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction

although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our Constitutional system has thus been made possible."

144 Now, in the Pennsylvania Gas Case, 252 U. S., at page 30-31 the court said.

"The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Commission Act expressly withholds the subjects from Federal control.

"The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is

conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in the city.

"This local service is not of that character which requires general and uniform regulation of rates by Congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject.

Now, we shall have occasion, from the cases cited in the Pennsylvania case, to see to what extent it lies within the power of a state directly to affect, regulate or burden interstate commerce—and by "burden" is meant anything that imposes either a restrictive or an onerous load upon the commerce,—so any taxation is a burden, although the states have the right to tax, still a direct tax on interstate commerce is not permitted, at all, because it is a direct burden. It may not be a prohibitive or exclusive burden, but it is a burden, and to that extent it falls without the power of the state. It be-

comes important to consider the exact meaning of this phrase, 145 in differentiating the cases which arise in which interstate commerce is to some extent involved,—the cases where the right to burden or affect is denied, and those in which the power of the state is sustained because of local interest, and where Congress had not entered the field. In a case like this, if Congress undertook to regulate the rates for the transportation and sale of gas transported in interstate commerce, as an incident to that it would have a right, undoubtedly, to regulate the intrastate business which was so interwoven with the interstate commerce as to make it a part of it. That is shown by the Minnesota Rate Cases. It was said there that the states had always regulated rates in the states, where it was purely a matter of intrastate commerce, and, while the Government had exercised control over all interstate rates, that it had never entered the field or sought by any regulation or administrative policy to take away from the states the right to control commerce that was purely intrastate; but in the Minnesota Rate Cases, Justice Hughes said that clearly Congress had the right to do that if it signified its intention,—it had the power to do it, and since then that principle has been fully recognized.

In the case of *Schollenberger v. Pennsylvania*, 171 U. S., 1, on page 13, this is said:

"To the same effect, we think, is the case of *Railroad Company v. Huson*, 95 U. S. 465, 469, in which it was said that 'Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit and regulate that which is interstate, than it can that which is with foreign nations'. The court, therefore, while conceding the right of the state to enact reasonable in- 146 spection laws to prevent the importation of diseased cattle, held the laws of Missouri there under consideration to be invalid, because it prohibited absolutely the introduction of Texas cattle during the time named in the Act, even though they were perfectly healthy and sound.

"The court said that a state could not under the cover of exercising its police powers substantially prohibit or burden either foreign or interstate commerce. Reasonable and appropriate laws for the inspection of articles, including food products, were admitted to be valid, but absolute prohibition of an unadulterated, healthy and pure article has never been permitted as a remedy against the importation of that which was adulterated and therefore unhealthy or impure."

I am quoting, because of certain principles that have been laid down, and because I prefer to state them in the language of the Supreme Court, and as indicating what is meant by the cited cases that are applicable to the case before us.

In *Brown v. Maryland*, 12 Wheat., 419, l. c., 423, the court said:

"If Maryland has a right to enact laws of this description, she has a right to regulate her own foreign commerce, although, by the constitution, it is exclusively vested in Congress. The imposition of import duties is often resorted to, not for the purpose of revenue, but to regulate commercial intercourse with foreign countries. Discriminating duties, protective duties, prohibitory duties, are so many commercial regulations. These may all be resorted to under the guise of license laws. If Maryland has a right to pass general license laws, she may pass partial ones; she may select particular commodities and burden their sale with a license duty; she may establish a tariff discriminating duties for himself and affect, if not defeat, the commercial policy of the country.

147 In *Heyman v. Hays*, 236 U. S., 178, the court says:

"The right to engage in interstate commerce is not the gift of a state; it cannot be regulated or restrained by a state, nor can a state exclude from its limits a corporation engaged in such commerce."

And the court, in the same case, cited *West v. Kansas Natural Gas Company*, 221 U. S., 229, l. c. 260, wherein it was observed:

"At this late date, it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce."

Now, the *Minnesota Rate Cases*, again, have some particular phrases in them that require special notice in this connection. I refer to *Minnesota Rate Cases*, Volume 230, page 252, in which it is said:

"Even without action by Congress, the commerce clause of the Constitution necessarily excludes the states from direct control of subjects embraced within the clause which are of such a nature that, if regulated at all, their regulation should be prescribed by single

authority. There is thus secured the essential immunity of interstate intercourse from the imposition by the states of direct burdens and restraints."

The court, in the same case, further said, l. c. 396:

"If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of federal regulation should be free. If the Acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of federal authority touching the interstate rates said to be affected. On the other hand, if the state in
148 the absence of federal legislation would have the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted."

In the same opinion, the court further said, l. c. 399:

"The grant in the Constitution of its own force—that is, without action by Congress, established the essential immunity of interstate commercial intercourse from direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, states may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting legislation.

"The principle which determines this classification, underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce."

In the case of *Wabash v. Illinois*, 118 U. S., 557, l. c. 571, the Supreme Court holds: that interstate commerce which is national in its character is subject to regulation by Congress exclusively. The court, in its opinion, said:

"The line which separates the power of the states from this exclusive power of Congress is not always distinctly marked, and often times it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the par-

ticular rights involved; but we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom does en-

149 croach upon the exclusive power of Congress. * * *

The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interest of others. Nay, more—it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries, he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. * * *

“And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.”

Those remarks are thought pertinent in the case at bar. This gas originates in Oklahoma, passes through Kansas and comes into Missouri; and, of course, if the principle contended for by complainant is indulged, there might be, could be, and probably would be such regulation in these various states as in a very prohibitive degree to burden, restrict and embarrass the commerce of this Nation.

Now, having it clearly disclosed that this is interstate commerce—and from all that has been said here, and from reading back the reports and decisions upon which the conclusion was based that there can be no direct regulation or burden of strictly interstate commerce by the states, it would seem to be beyond question that the state,

150 here, and its Public Service Commission, has no authority to regulate the rate to be charged for such commerce by the defendant company. Of course, it is contended that the company has so far subjected itself, by bringing its product into the state, and by doing so through mains and certain instrumentalities that have been established and built for that purpose, that it has voluntarily submitted itself to the jurisdiction of the state, and that, notwithstanding the fact that this is interstate commerce, it is still subject to state regulation.

I cannot indulge the contention that by the contract—by the supply contract—which was made between the Kansas City Gas Company and the Kansas Natural Gas Company that the Kansas Natural

Gas Company necessarily or impliedly became a party to the franchise, and, therefore, subject to the control of the State. It never has been my opinion that that was the effect of that contract. It was simply that the Kansas City Gas Company, when that franchise was granted, was required by the city to disclose the source of its supply, so that the city would be apprised where it could get the gas, and upon what terms it could get it; but there never has been any contractual relation between the Kansas Natural Gas Company and Kansas City, and there never has been anything involved in the franchise which imposes a necessary duty upon the Kansas Natural, of which the city could avail itself directly, but simply it was known that the gas was to be procured from the Kansas Natural and its predecessors, and, necessarily, the city recognized that the company

151 had to have some way to make the connections, whereby that supply could be effective; and in the Pennsylvania case, by means of transportation through the State and into the State, that feature was far more pronounced than in this case; yet, there was no disposition by the Supreme Court in that case to recognize that for that reason the Gas Company had placed itself within the jurisdiction of the State authorities.

Now, it is very probable, of course, that this is a commodity that should, in some way, be regulated. As the Supreme Court has said, that is a matter confided to the Federal Congress. There is no doubt that these gas companies, furnishing gas throughout the United States, should have some body that may exercise control over them; but I am compelled to stand for what I believe the law has been disclosed to be, that the power of direct regulation of interstate commerce, whether Congress has entered the field or not, cannot be and is not lodged in the state. The fact that indirectly at the end of this interstate commerce local interests are affected is not decisive of the question. It is necessary that this company, itself, must have intervened in local affairs, as an instrumentality taking part in the distribution and operation of the affairs connected with that commerce, before local jurisdiction can be conferred.

This answers the question of "reasonableness" which has been raised; and we are compelled to come to the conclusion that under the rules announced by the court, any direct burden or regulation upon commerce which is distinctly interstate is unreasonable.

152 Judge Pollock, in the District of Kansas, in the case of Central Trust Company v. Consumers Light, Heat and Power Company, in which was involved the right of the Kansas Natural Gas Company to increase its rates in Kansas without the consent of the Public Utilities Commission of that State, came to the same conclusion as that announced in this opinion.

I am compelled to conclude, therefore, that the injunction prayed must be denied.

153 UNITED STATES OF AMERICA, *set*:

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete tran-

script of the record, assignment of errors, and all proceedings in the case wherein State of Missouri, on the relation of Jesse W. Barrett, Attorney General of the State of Missouri, and the Public Service Commission of the State of Missouri, and the Kansas City Gas Company, are Complainants, and The Kansas Natural Gas Company is defendant, as fully as the same appears on file and of record in my office, in accordance with præcipe filed herein and made a part hereof.

I further certify that the original Citation is prefixed hereto and returned herewith.

Witness my hand as Clerk, and the seal of said Court. Done at office in Kansas City, Missouri, this 16th day of November, A. D. 1922.

[Seal of the United States District Court, Western Division,
Western District, of Missouri.]

EDWIN R. DURHAM,
Clerk U. S. District Court,
By H. C. SPAULDING,
Deputy Clerk.

Endorsed on cover: File No. 29,253. W. Missouri D. C. U. S. Term No. 703. State of Missouri on the relation of Jesse W. Barrett, attorney general; Public Service Commission of Missouri and Kansas City Gas Company, appellants, vs. Kansas Natural Gas Company. Filed November 20th, 1922. File No. 29,253.

FILED

MAR 14 1924

WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

October Term, 1923.

No. 155.

STATE OF MISSOURI ON THE RELATION OF JESSE
W. BARRETT, ATTORNEY GENERAL;
PUBLIC SERVICE COMMISSION OF MISSOURI;
KANSAS CITY GAS COMPANY, *Appellants*,
vs.
KANSAS NATURAL GAS COMPANY, *Respondent*.

Filed November 20, 1922.

*Appeal from the District Court of the United
States for the Western District of Missouri.*

Consolidated with
No. 133.
KANSAS NATURAL GAS COMPANY, *Plaintiff in Error*,
vs.
STATE OF KANSAS, on relation of A. E. Helm, Attorney for the
Public Utilities Commission of the State of Kansas,
Defendant in Error,
and
No. 137.
STATE OF KANSAS EX REL., *Appellant*,
vs.
CENTRAL TRUST COMPANY OF NEW YORK, *Respondent*.

BRIEF FOR APPELLANTS.

L. H. BREUER,
FRANK E. ATWOOD,
*Solicitors for State of Missouri and Public
Service Commission of Missouri.*

Jefferson City, Mo.

J. W. DANA,
Solicitor for Kansas City Gas Company.
910 Grand Ave., Kansas City, Mo.



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In the Supreme Court of the United States

October Term, 1923.

No. 155.

STATE OF MISSOURI ON THE RELATION OF JESSE
W. BARRETT, ATTORNEY GENERAL;
PUBLIC SERVICE COMMISSION OF MISSOURI;
KANSAS CITY GAS COMPANY, *Appellants*,

VS.

KANSAS NATURAL GAS COMPANY, *Respondent*.

Filed November 20, 1922

*Appeal from the District Court of the United
States for the Western District of Missouri.*

Consolidated with

No. 133.

KANSAS NATURAL GAS COMPANY, *Plaintiff in Error*,

VS.

STATE OF KANSAS, on relation of A. E. Helm, Attorney for the
Public Utilities Commission of the State of Kansas,
Defendant in Error.

and

No. 137.

STATE OF KANSAS EX REL., *Appellant*,

VS.

CENTRAL TRUST COMPANY OF NEW YORK, *Respondent*.

BRIEF FOR APPELLANTS.

This suit was brought to enjoin the Kansas Natural Gas Company, hereinafter called the Supply Company, from shutting off the supply of

natural gas to the Kansas City Gas Company and other distributing companies in the State of Missouri. Jurisdiction rested on diverse citizenship (Rec. 3). The trial court denied the injunction on the ground that the Supply Company was engaged in interstate commerce and free from all state control. This appeal is to review that decree.

The interest of the State of Missouri and its Public Service Commission, hereinafter called the Commission, in this suit is to sustain its police power and its right to regulate public utilities furnishing natural gas within said state.

The interest of the Kansas City Gas Company in this suit lies in protecting itself and its investments through the regulatory powers of the Commission from being wiped out by arbitrary demands and summary changes in the town border rates for natural gas made by said Supply Company.

This case was consolidated for argument with the cases of *Kansas Natural Gas Company v. State of Kansas*, No. 133 (hereinafter called the Kansas case), on writ of error to the Supreme Court of Kansas to review a judgment of said court sustaining the jurisdiction of the Commission of said state over said Supply Company; and the case of the *State of Kansas v. Central Trust Co. of New York*, No. 137, on appeal from the United States District Court of Kansas denying the jurisdiction of the Public Utilities Commission of said state over said Supply Company.

The original bill of complaint in this case was filed by the State of Missouri and its Public

Service Commission (Rec. 2). On motion (Rec. 16) the Kansas City Gas Company was "made a party complainant" and filed an intervening bill of complaint (Rec. 16, 17) alleging the same facts, and that it had an interest in the subject of the action and the relief demanded, and praying the same relief; so that said Kansas City Gas Company is not a mere intervener but is a *party complainant*, and entitled to be considered as such

STATEMENT OF FACTS.

The material allegations of the bills of complaint admitted by the answer, are:

That the Supply Company "furnishes, delivers and sells natural gas" (Rec. 3, par. 6; 10, par. 6) "to the Kansas City Gas Company, the Joplin Gas Company, Fort Scott and Nevada Light, Heat and Power Company, Carl Junction Gas Company, Oronogo Gas Company, and other local distributing companies in other communities within the State of Missouri" (Rec. 3, 10); that it maintains physical connections within the State of Missouri between its plant and system and the distribution plants and systems of said local distributing companies (Rec. 3, 10, 13, par. 18); that its pipeline system is "physically and permanently connected within the State of Missouri to the main system of the Kansas City Gas Company and other local public service gas corporations within said State" (Rec. 7, par. 18; 13, par. 18); "that said local distributing companies own, operate, control and manage local gas plants and systems and operate the same for public use under privileges, licenses and franchises granted by the State of Missouri and by the political subdivisions and municipalities thereof in which they are doing business" (Rec. 4; 10, par. 6); "and that said Kansas Natural Gas Company has a *complete physical monopoly of the supply of natural gas* to said local distributing companies and said cities and their in-

habitants within the State of Missouri" (Rec. 4, par. 6); said Supply Company "*admits that it has a monopoly on the supply of natural gas to said companies*" (Rec. 11, par. 6); that on April 1, 1922, the Supply Company notified the distributing companies that it would increase the city gates rate for gas from 35 to 40 cents per thousand cubic feet (Rec. 6, par. 10; 12, 95); that the Kansas City Gas Company notified the Supply Company that it would not accept and receive the gas delivered by said Supply Company at said increased rate until authorized by the Public Service Commission of Missouri (Rec. 6, 12, 95); that thereupon the Supply Company notified the distribution companies that *unless they agreed to accept and pay for said gas at said increased rate, said Supply Company would discontinue the service and supply of natural gas on May 1, 1922, to said local distributing companies at Kansas City, Joplin, Oronogo, Carl Junction, Nevada, and other communities in the State of Missouri* (Rec. 6, par. 12; 12, 97); the bill further alleged (Rec. 6) and the answer admitted (Rec. 12) "that said Kansas Natural Gas Company will discontinue the supply of natural gas to said local distributing companies and the citizens and inhabitants of said city unless enjoined and restrained from so doing"; that the Supply Company did not file with the Commission in the manner provided by the Public Service Commission Act of Missouri any new schedule of rates or any new rate or charge or any new form of contract or agreement or any new practice relating to rates, charges or service (Rec. 7, par. 14; 12)

and said Supply Company filed no application with said Commission for any such change or rate increase (Rec. 7, par. 14) admitted (Rec. 12, par. 14).

The Supply Company denies the jurisdiction of the Commission to regulate its city gates rates for gas furnished to the Kansas City Gas Company and other distributing companies and refuses to file its schedule of rates and changes therein with the Missouri Commission in the manner provided by Sec. 69-12, of the Public Service Commission Act (Art. IV, Laws of Missouri 1913; R. S. Mo. 1919, Sec. 10478, par. 12), or to submit in any manner to the jurisdiction of said Commission or the State of Missouri in the matter of rates or service or supply of natural gas.

Appellants contend that the business carried on by the Supply Company consists primarily in supplying, delivering, furnishing and selling natural gas and natural gas service, locally and directly to said Kansas City Gas Company and other distributing companies and through them to the local general public.

The material facts stipulated on the trial are as follows:

The Supply Company is in control of and operates all the properties owned by the Kansas Natural Gas Company, The Kansas City Pipe Line Company, Kas Gas Company and Kansas Natural Gas, Oil Pipe Line and Improvement Company under private arrangements between said companies (Rec. 38, par. 1). During 1906 the Kansas City Gas Company commenced to furnish and sell natural gas to Kansas City, Missouri, and

its inhabitants under the terms and provisions of Ordinance No. 33887 of said city fixing rates for natural gas furnished by the Supply Company (Rec. 38, par. 2).

From 1906 to October, 1912, the Supply Company furnished gas to the Kansas City Gas Company and the latter accepted, received and paid for the same under and in conformity with the terms and provisions of a certain contract (Rec. 38, par. 3, 41) providing, among other things, that the Supply Company was the owner of gas lands and leases in the gas belt of Kansas and a pipe line from said fields to Kansas City, Missouri (Rec. 41); that the Kansas City Gas Company was the owner of an ordinance authorizing it to supply natural gas to said city and its inhabitants for a term of thirty years from September 27, 1906 (Rec. 49, 61), said ordinance being No. 33887, marked Exhibit 1 and attached to said contract (Rec. 41, 49); that the Supply Company will during the period of said ordinance "*supply and deliver* through its said pipeline or lines, to said parties of the second part, or any successor in the ownership of the property for the distribution of gas for Kansas City, Missouri, at a pressure of twenty (20) pounds at the point of delivery above mentioned, *natural gas in such amount as will at all times fully supply the demand for all purposes of consumption*, as provided in this contract, for the consideration hereinafter mentioned" (Rec. 41). Said contract further provided that, "so long as the party of the first part is able to *supply* the same, the parties of the second part agree to buy

from the party of the first part *all the gas they may need to fully supply the demand for domestic consumption in said city*" (Rec. 42). The consideration for such gas was a certain percentage of the gross receipts from the sale of said gas at said ordinance rates (Rec. 42, 43). The ordinance (Rec. 49) *runs for a term of thirty years* from September 27, 1906 (Rec. 61), and fixed a schedule of rates varying from time to time (Rec. 54). It referred to the gas supply contract with the Kaw Gas Company and The Kansas City Pipe Line Company, predecessors in title and interest of the Supply Company herein (Rec. 58); provided for the shut down of the manufactured gas plant and the use of the distribution system of the local company for the distribution and furnishing of said natural gas (Rec. 57, 60). This ordinance was attached to the gas supply contract (Rec. 41, 61).

There were gas supply contracts similar in form and substance between the Supply Company and the other local distributing companies in Kansas and Missouri (Rec. 5, par. 7; 12, 111), and said local companies operated under city ordinances substantially in the same form and substance as the ordinance of Kansas City, Missouri.

From October 12, 1912, to August 13, 1917, the Supply Company was operated by Receivers appointed by the United States District Court for the District of Kansas (Rec. 38) and by Receivers appointed by a state court of Kansas in an anti-trust and monopoly suit (see *McKinney et al. v. Landon et al.*, 209 Fed. 300, and *Landon et al. v. Kansas Natural Gas Co. et al.*, 217 Fed. 187); said Re-

ceivers, both federal and state, took over the Supply Company's properties and affairs and business and operated them under orders of their respective courts without specifically adopting said supply-contracts (Rec. 38, par. 4; 41) which were subject to rejection by the court; *but continued to deliver gas to the distributing companies and accepted payment therefor at the rates provided for in said contracts* (Rec. 38, par. 4) (249 U. S. 236, 243).

From August 13, 1917, to January 1, 1921, the Receivers of the Supply Company furnished gas to the Kansas City Gas Company and other distributing companies under and pursuant to certain administrative orders of the United States District Court for the District of Kansas (Rec. 38, 62, 65, 68, 70, 71, 72, 73). These court orders (Rec. 62 to 73) fixed both the purchase price and the selling rates of the distributing companies, and enjoined said companies from interfering with said Receivers maintaining said court-made rates upon the erroneous assumption that the distribution companies were mere agents of the Supply Company under said contracts; reversed by this court in *Public Utilities Comm. v. Landon*, 249 U. S. 236.

After the reversal of said Landon case by this court, on re-trial the United States District Court for the District of Kansas, in *Landon v. Court of Industrial Relations*, rendered its final opinion and finding on November 17, 1920 (269 Fed. 423, 432), that "the obligations of the Kansas Natural Gas Company under said supply-contracts

have been discharged and terminated by reason of the failure of gas as provided for in said supply-contracts"; and on December 24, 1920, entered its final decree (Rec. 39, 73), in which it enjoined all the rates fixed by Kansas and Missouri and the city ordinances and Commission orders of said states, and the "*rates fixed or referred to*" in said supply-contracts (Rec. 80).

Thereupon, December 24, 1920, the Federal Receivers (Rec. 39) by order of court returned the property and business of said Supply Company back to the corporation for management and control, and said business has been operated by said corporation since said date (Rec. 39, par. 7).

On May 3, 1920, the Kansas City Gas Company filed an application with the Public Service Commission of Missouri (Rec. 39, par. 8; 82), in which it showed the Commission that the Supply Company, by authority of the court (Rec. 71, 72), had increased its city gates rate for gas from 28 cents to 35 cents per thousand feet; asked for a corresponding increase in its selling rates and prayed the Commission (Rec. 83): "To authorize the Kansas City Gas Company to pay such price per thousand cubic feet for natural gas delivered at the city gates on and after the following schedule takes effect, as may be necessary to produce an adequate supply of gas to meet the demands of its customers therefor" (Rec. 83).

On June 14, 1920, the Missouri Commission rendered its opinion and order (Rec. 39, par. 9; 84), and after analyzing the evidence said (Rec. 87):

"We will, therefore, permit the Kansas City Gas Company to pay said 35-cent city-gate rate for natural gas and will approve the rates proposed for the Kansas City Gas Company to its consumers" (Rec. 87).

The Commission also entered on June 14, 1920, an order increasing the Kansas City Gas Company's selling rates (Rec. 39, 87), and further providing:

"Ordered 4: That the Kansas City Gas Company be permitted to pay the Kansas Natural Gas Company or its Receiver the 35-cent city-gate rate for natural gas as provided in the order of Judge Booth mentioned in the report of the Commission herein, until otherwise ordered by the Commission" (Rec. 88).

The Kansas City Gas Company filed with the Commission its *acceptance of this order* (Rec. 91), as provided by law (Sec. 25, Public Service Com. Act, Laws of Missouri 1913), and forthwith commenced to pay said Supply Company said 35-cent rate (Rec. 91) and ever thereafter continued so to do, until the threatened shut-off of the supply and the order of the trial court increasing said rates as above stated.

The Supply Company produces and-or purchases gas in the gas fields of Kansas and Oklahoma and carries the same by pipeline into and through the State of Kansas and into the State of Missouri (Rec. 39); it sells no gas direct to consumers except a few main line consumers and

to consumers in the Joplin, Missouri, mining district (Rec. 39, par. 10); all the gas produced or purchased in Oklahoma or Kansas by the Supply Company is so intermingled in the pipelines that it cannot be distinguished (Rec. 39, par. 10); said gas is transported to the various cities in Kansas and Missouri where the Supply Company maintains permanent physical connections within said states with the distribution systems (Rec. 39) of the distributing companies; the Kansas City Gas Company maintains gas holders in connection with its distribution system having a reserve storage capacity of five million cubic feet of gas (Rec. 39); in case of line breaks, interruptions or shortages in the pipeline supply, this reserve-holder-gas is used to supply the consumers (Rec. 39, par. 10). All the Supply Company's gas is sold in Kansas and Missouri (Kansas Case Rec. 13).

The gas delivered by the Supply Company to the Kansas City Gas Company is measured at two separate measuring stations operated by the Supply Company (Rec. 39, par. 11). One is located immediately west of the Kansas-Missouri state line in Kansas, from which station the Supply Company's *pipeline is extended some eight feet into the State of Missouri* and *upon a public street of Kansas City, Missouri*, and there physically and permanently connected to the street main system of the Kansas City Gas Company (Rec. 39, par. 11). The gas delivered at this station is measured or computed and billed to the Kansas City

Gas Company in accordance with measurements of a meter located in Kansas (Rec. 40). The *second measuring station is located* near the Kansas-Missouri state line *in the State of Missouri*, at which point about one-third of the total gas furnished to the Kansas City Gas Company is measured and delivered (Rec. 40). The Supply Company maintains at this second connection about 500 feet of pipeline between the Kansas-Missouri state line and said measuring station, *which pipeline is located on a public street of Kansas City, Missouri* (Rec. 40, par. 11). The gas furnished through this station is measured and computed and billed to the Kansas City Gas Company in accordance with the measurements of the *meter located in Missouri*; the Supply Company has no franchise granted by the city of Kansas City, Missouri, authorizing it to occupy the streets, alleys and public places upon and along which to lay, maintain or operate its pipelines (Rec. 40, par. 11).

There are no advance orders given by the Kansas City Gas Company to the Supply Company for the shipment of any definite quantity of gas to Kansas City Missouri (Rec. 40, par. 12) at any given time, but said gas is furnished and delivered continuously to meet the requirements of the Kansas City Gas Company as governed by the requirements of its consumers from time to time. Gas is delivered by the Supply Company to the distribution company and by the distribution company to the consumer "instantly" to supply his instantaneous and continuing demands.

(See Rec. in *K. C. Gas Co. et al. v. Kansas Natural Gas Company, John M. Landon et al.*, No. 330, Oct. term, 1918, p. 812, decision reported 249 U. S. 236.)

The pipelines operated by the Supply Company extend from the State of Oklahoma into and through the State of Kansas and into the State of Missouri, and said Supply Company furnishes gas to local distributing companies in some forty cities, towns and villages in the States of Kansas and Missouri (Rec. 40, par. 13); said pipelines lie in the main on the privately owned rights-of-way of the Supply Company, but cross public highways and in some instances run along the public highways in the States of Missouri and Kansas (Rec. 40).

The population of Kansas City, Missouri, is approximately 360,000 (Rec. 40, par. 14); the population served by the distributing companies receiving their gas supply from the Supply Company in Kansas and Missouri exceeds one-half million (Rec. 40).

No joint ownership or intercorporate relation exists between the Supply Company and the Kansas City Gas Company or any other local distributing company (Rec. 40, par. 15).

The Kansas Natural Gas Company is authorized to do business in the State of Missouri (Rec. 88). The objects and purposes for which it is incorporated are, among other things: "To produce, purchase and acquire natural gas; to pipe, convey and transport natural gas from the place or places where the same is produced, purchased

or acquired, to such cities, towns, villages and places in the States of Kansas and Missouri as may afford convenient and satisfactory markets for the same; to lay, maintain and operate" pipelines and "to lay such street mains and conduits as may be necessary to supply gas to consumers; to build, construct and operate" such apparatus "as may be necessary or convenient in the production, transportation and *supply* of natural gas" (Rec. 88).

The Kansas City Pipe Line Company, predecessor of the Kansas Natural Gas Company, and the party to the supply-contract with the Kansas City Gas Company, is authorized by its charter, among other things, to "market and sell" natural gas and "to take and hold rights and franchises for the *sale, furnishing* and transportation of natural gas" and "to purchase or otherwise acquire natural gas and to transport, pipe, market and sell the same to consumers thereof" (Rec. 89).

The Kaw Gas Company, named in the supply-contract and ordinance, and one of the predecessors in right, title and interest of the Kansas Natural Gas Company (Rec. 38), was authorized to do business in Missouri, and among other things was authorized to furnish, market and sell natural gas (Rec. 89, 90).

The Kansas Natural Gas Company on November 1, 1913, filed with the Public Service Commission of Missouri in the manner provided by the Public Service Commission Act of said state its schedule of rates, contracts, rules and regulations (Rec. 108-111).

On April 1, 1922, said Supply Company summarily notified the Kansas City Gas Company that on and after April, 1922, meter-readings it would charge at the rate of 40 cents per thousand cubic feet for all gas delivered at the city gates (Rec. 95); on April 20, 1922, the Kansas City Gas Company notified said Supply Company it would accept and receive gas delivered into its mains on and after said April, 1922, meter-readings only upon the express understanding that it would pay therefor at the rate of 35 cents per thousand cubic feet until the effective date of orders issued by the Public Service Commission of Missouri authorizing it to pay 40 cents per thousand cubic feet for gas or such other rate as said Commission might allow (Rec. 95, 96); on April 25, 1922, the Supply Company notified the Kansas City Gas Company that it would not furnish said gas at 35 cents, and that unless said Kansas City Gas Company agreed to accept and pay for said gas at the rate of 40 cents on or before the first day of May, 1922, said Supply Company *would shut off and discontinue the supply of gas to said Kansas City Gas Company* (Rec. 97); on April 26, 1922, the Kansas City Gas Company notified the Supply Company that it would not agree to accept and pay for said gas at said rate of 40 cents (Rec. 98); on April 29, 1922, this suit was commenced below to enjoin the Kansas Natural Gas Company from arbitrarily shutting off the supply of natural gas to the Kansas City Gas Company, the city of Kansas City, and other cities and communities in said state (Rec. 2).

The trial court denied the writ of injunction and dismissed the bill (Rec. 26, 27). The case is here on appeal for review. However, the trial court was under the necessity of entering a remedial and regulatory order allowing the Kansas City Gas Company to forthwith increase its selling rates for gas 5 cents to enable it to pay said 5-cent increase in the city gates rate, and accordingly enjoined said Commission from interfering with said increased rate (Rec. 26).

ASSIGNMENT OF ERRORS.

The complainants assigned the following errors (Rec. 29):

Assignment No. 1. That the court erred in holding that the furnishing, delivery and sale of natural gas locally at Kansas City, Missouri, either within or without the State of Missouri by the Kansas Natural Gas Company to the Kansas City Gas Company is interstate commerce, national in character and free from regulation by the State of Missouri through its Public Service Commission.

Assignment No. 2. That the court erred in denying the injunction prayed in the bill of complaint and intervening bill of complaint.

Assignment No. 3. That the court erred in dismissing the bill of complaint and intervening bill of complaint.

(21). In the Minnesota Rate Cases 230 U. S. 352, 1. c. 399 this Court said:

"The grant in the Constitution of its own force—that is, without action by Congress, established the essential immunity of inter-state commercial intercourse from direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all their regulations should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment, according to the special requirements of local conditions, states may act within their jurisdictions until Congress sees fit to act; and when Congress does, the exercise of its authority overrides all conflicting legislation.

"The principle which determines this classification, underlies the doctrine that the state cannot, under any guise, impose direct burdens upon interstate commerce."

This is a clear classification of admittedly interstate commerce into two classes:

(1) The Exclusive Class. Interstate commerce in and relating to subjects or matters, which in their nature are general or national and demand a general uniform system of regulation—as to these the power of Congress is exclusive of all state regulation.

In the Minnesota Rate Cases 230 U. S. 581,
1. a. 329 this Court said:

ASSIGNMENT OF ERRORS.
The Court in the Commission of the new
force-first is, without action by Congress, ex-
cluded the essential principle of interstate
commercial intercourse from direct control of
the states with respect to those subjects ex-
cluded within the grant which was given a re-
servation to demand that the states at all their
negotiations should be governed by a single au-
thority. It has repeatedly been declared by this
Court that as to those subjects which require a
general system of uniformity of regulation, the
power of Congress is exclusive. In other matters,
however, the power of the states is reserved, according
to the special provisions of local conditions.
States may act within their jurisdiction until
Congress sees fit to act; and when Congress does,
the exercise of the authority overrides all con-
flicting legislation.
denying the jurisdiction of the states in com-
plaint and intervening bill of complaint.
The principle which governs this class of
action, whether the doctrine that the state
cannot, when any line, those direct burdens
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This is a clear classification of absolutely
interstate commerce into two classes:

(1). The Exclusive Class. Interstate com-
merce in and relating to subjects or matters,
which in their nature are general or national and
demand a general uniform system of regulation—
to these the power of Congress is exclusive of all
state regulation.

(2). **The Permission Class.** Interstate commerce in and relating to subjects or matters, which in their nature are special or local and admit of a diversity of treatment or regulation according to the special requirements of local conditions—as to these the power of Congress is permissive of state regulation until Congress acts.

This classification was recognized, amplified and followed by this Court in *Pennsylvania Gas Co. vs. Public Service Commission* 252 W. S. 23.

2. **The Kansas Natural Gas**

It was recognized and followed by the Supreme Court of Kansas in the *Kansas* case No. 133, here on writ of error for review.

It was ignored and not followed by the Federal Trial Courts below in cases No. 137 and No. 155, here on appeal for review, said Courts holding that the commerce clause is exclusive and bars all state regulation of all subjects, matters and instruments of interstate commerce irrespective of their class—national or local.

5. **The specific exclusion of**

This Court very aptly said in the *Minnesota and Pennsylvania* cases supra, that no hard and fast rule—no rule of thumb—could be laid down to determine into which class all interstate commerce would fall; but each case must be decided on its own special, local and peculiar facts.

The class into which the case at bar falls depends upon a consideration of the following points.

(2). The Minnesota Game and Fish Commission is and relating to subjects in matters, which in their nature are special in local and admit of a diversity of treatment or regulation according to the special requirements of local conditions as to these the power of Congress is permissive of state regulation until Congress acts.

This classification was recommended, applied and followed by this Court in *Minnesota v. United States*, 137 U. S. 515.

It was recognized and followed by the Supreme Court of Kansas in *State v. Fox*, 122 Kan. 100, 248 P. 2d 100, 101.

It was likewise not followed by the United States Supreme Court in *United States v. Fox*, 122 Kan. 100, 248 P. 2d 100, 101, where on appeal for review, said Court held that the Congress alone is exclusive and that all state regulation of all subjects, whether and instruments of interstate commerce or otherwise, is their class-national or local.

This Court very aptly said in *Minnesota v. United States*, 137 U. S. 515, 520, that no part and part of the same rule of law should be laid down to determine into which class all interstate commerce falls, but each case must be decided on its own facts, local and peculiar facts.

The class into which the case at bar falls depends upon a consideration of the following points:

ARGUMENT.

The points of law and fact affirmed by appellants and denied by appellee are as follows:

1. The public welfare requires that the Kansas Natural Gas Company be regulated.

2. The Kansas Natural Gas Company is a public utility at common law.

3. The Kansas Natural Gas Company is declared by statutes to be a public utility.

4. Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

5. The specific exclusion of interstate commerce in natural gas from the Act of Congress regulating interstate commerce implies regulation by the states until Congress acts.

6. An importer who employs a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation.

7. The decision in *Public Utilities Commission et al. v. Landon, Receiver of Kansas Natural Gas Company*, 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates or fixed by contract, and the challenged rates, then before this court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the Kansas Natural Gas Company was then or is at this time, on the record now before this court, free from state regulation.

8. A public utility or one conducting a business affected with the public interest may not arbitrarily discontinue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

9. If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; second, at rates agreed upon.

POINT I.

The public welfare requires that the Kansas Natural Gas Company be regulated.

That said Supply Company needs regulation is conclusively proven by the following facts:

It has a complete "monopoly on the supply of natural gas" (Rec. 4, par. 6; 11, par. 6) to all said distributing companies and some forty cities, towns and villages and 500,000 people within the States of Kansas and Missouri (Rec. 62, 65).

The court below in this case found: "*Now, it is very probable, of course, that this is a commodity that should, in some way, be regulated*" (Rec. 131).

The Federal Court in the Kansas case, Appeal No. 133, found: "The only source of supply of natural gas which said Receiver (of the Topeka distributing company) has or can procure is from the Natural Company." (*Central Trust Co. of N. Y. v. Consumers L. H. & P. Co.*, 282 Fed. 680; see brief for Supply Company in *Kansas Natural Gas Co., Plaintiff in Error, v. State of Kansas ex rel., Defendant in Error*, No. 642, Oct., 1922, Term in this court, p. 49.)

The Supreme Court of Kansas found: "This court reaches a conclusion * * * on the facts * * * that the regulation of its sale is necessary * * *." (*State ex rel. v. Kansas Natural Gas Co.*, 111 Kan. 809, 812, 208 Pac. 622.)

It usurped the right and assumed the power to determine and fix the selling rates for the Kansas City Gas Company and all other distributing companies in Kansas and Missouri; and through Receivers it enjoined said companies from applying to the rate-making powers of the states for reasonable rates satisfactory to them: "and the defendant distributing companies are permanently enjoined * * * from interfering with plaintiff (Receiver) in establishing and maintaining such rates as this court has approved or may hereafter approve for consumers of natural gas in Kansas and Missouri." (Landon Case, October, 1918, Term, Rec., p. 625.)

Reversed by this court in *Pub. Util. Comm. et al. v. Landon*, 249 U. S. 236.

See also:

Landon v. Pub. Util. Comm., 234 Fed. 152.
Landon v. Pub. Util. Comm., 242 Fed. 658.
Landon v. Pub. Util. Comm., 245 Fed. 950.
Landon v. Court of Industrial Relations
 (Kans. Comm.), 269 Fed. 411, 423, 433.
State v. Gas Co. et al., 102 Kan. 712, 172
 Pac. 713.

It so monopolized and dominated the natural gas supply in Kansas that it was prosecuted under the anti-trust and monopoly statutes of said State and held under a penal state receivership from 1912 to June 2, 1917. *Landon et al. v. Kansas Natural Gas Co.*, 217 Fed. 187; *McKinney v. Landon*, 209 Fed. 300. See also *State ex rel. v. Flannelly, Judge*, 96 Kan. 372, 152 Pac. 22.

Its rates and charges have always been restricted or regulated as follows:

A. From 1906 to October, 1912, by said supply-contracts and city ordinance rates referred to therein and attached thereto.

B. From October, 1912, to August, 1917, said contract and ordinance rates were continued in effect by administrative orders of court. Said State and Federal Receivers (Rec. 38, par. 4) "without specifically adopting or disavowing the supply-contracts of 1904-08 continued to deliver gas to local distributing companies and to accept payments as originally agreed." (*Commission v. Landon*, 249 U. S. 236, 243.)

C. From August, 1917, to November, 1918, under an administrative rate order of the United States District Court for the District of Kansas (Rec. 62), in which the Supply Company's rate was fixed at a certain percentage of the distributors' selling rates fixed by the court.

D. From November, 1918, to July, 1919, under another administrative rate order of the United States District Court for the District of Kansas (Rec. 65), in which the Supply Company's rate was fixed at a certain percentage of the distributors' selling rates fixed by the court.

E. From July 14, 1919, to July 1, 1920, under another administrative rate order of the United States District Court for the District of Kansas (Rec. 70-72), fixing city gates rates for the Supply Company ranging from 20 cents in Southern Kansas to 35 cents at Kansas City.

F. By the Public Service Commission of Missouri from July 1, 1920 (Rec. 87), to April 29, 1922, the date of the commencement of the suit below:

"Ordered 4: That the Kansas City Gas Company be permitted to pay the Kansas Natural Gas Company or its Receiver the 35-cent city-gate rate for natural gas as provided in the order of Judge Booth mentioned in the report of the Commission herein, until otherwise ordered by the Commission" (Rec. 88).

G. By the Public Utilities Commission of Kansas:

"That prior to about April 25, 1922, the said defendant (Kansas Natural Gas Company) maintained and charged a rate of 35 cents per thousand cubic feet for natural gate at the city gates of said cities; that said rate of 35 cents per thousand cubic feet of natural gas was authorized by an order of the District Court of the United States for the District of Kansas, First Division, under date of January 20, 1920, *and approved by an order of the Public Utilities Commission of the State of Kansas* under date of August 18, 1920." (Rec. in Kansas Case No. 133, Oct., 1923, Term, p. 6, par. XXXII.)

"The rate fixed by order of the Federal Court and approved by the Public Utilities Commission has been 35 cents per thousand cubic feet of gas to companies distributing and selling gas in various cities in this state. That was the legal rate" (*State ex rel. v. Gas Co.*, 111 Kan. 809, 810, 208 Pac. 622).

H. The court below in this case, though denying an injunction against the shutting off of the gas supply, was under the necessity of allowing a five-cent increase in the selling rates of the Kansas City Gas Company to enable it to pay a corresponding increase in the rates demanded by the Supply Company (Rec. 26).

Many of the states have passed laws governing these natural gas supply companies. "The legislation by the states demonstrates that the sale of natural gas should be regulated" (*State ex rel. v. Gas Co.*, 111 Kan. 809, 811, 208 Pac. 622).

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

German Alliance Ins. Co. v. Kansas,
233 U. S. 389, syl.

"*Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation. * * *

German Alliance Ins. Co. v. Kansas,
233 U. S. 389.

The final decree on rehearing, after reversal by this court (249 U. S. 236), in *Landon v. Commission*, the trial court permanently enjoined on behalf of the Receiver and the Kansas Natural Gas Company all rates fixed by statute, by ordinance and by Commission orders as confiscatory on the sole and only ground and theory *that they were subject to regulation*. (See opinion *Landon v. Comm.*, 269 Fed. 411, 421; decree Rec. 71, 76.)

"Seventh. That the proportional part of the rates prescribed by the 28-cent Rate Order (of the Kansas Commission), which was paid by said distributing companies to the Receiver of the Kansas Natural Gas Company during the time said rate schedule was in force, was non-compensatory to the Receiver, did not furnish the said Receiver a fair and reasonable return upon the property in his charge and used and useful in furnishing said gas to said distributing companies, *was confiscatory and violative of the Constitution of the United States*" (Italics ours, Rec. 76-77.)

If said Supply Company's rates were not subject to compulsion by the state they could not be enjoined as *confiscatory*.

Without conference or agreement, it summarily notified the Kansas City Gas Company and some

forty other distributing companies (Rec. 12) that it would within fifteen days increase its rate from 35 to 40 cents, a 14.3 per cent. increase, without time or opportunity for said companies to procure a corresponding increase in their selling rates. The Missouri Public Service Commission Act (Art. 4, Sec. 69-12, and Sec. 70, Laws 1913; R. S. Mo. 1919, Sec. 10478-12 and Sec. 10479, hereinafter quoted) provides that rates must be on file 30 days before they could take effect by operation of law, and the Commission may suspend them 120 days and then six months, pending hearings. The Kansas Act provides that no rates shall take effect without the order of the Commission after a hearing.

“Unless the commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same services on the 1st day of January, 1911.” *Laws of Kansas* 1911, Chapt. 238, Sec. 30; G. S. 1915, Sec. 8358.

Therefore it is obvious that such a drastic notice was arbitrary and unreasonable and such business needs restriction and regulation.

Finally, an all sufficient reason, showing the need of regulating said Supply Company, is the fact that said company summarily, by mandatory notice, without conference or agreement, and without the

determination of the reasonableness of its demands by any city council, state commission, court, or public authority or private arbiter, threatened and declared its positive intent (Rec. 97) to shut off and discontinue the supply of gas to some forty cities, towns and villages, and one-half million people having no substitute or means of supply, unless its demands were immediately unconditionally met.

Nowhere in the record in this or these consolidated cases, or the Landon case (249 U. S. 236), is it claimed or suggested that the Kansas Natural Gas Company does not need regulation.

The following long list of cases, regulatory in their nature, in which the Kansas Natural Gas Company has been directly or indirectly involved and in which the States of Kansas and Missouri and their commissions and cities have been seeking in some manner to control said Supply Company, evidences a pressing need for regulation:

State of Kansas v. Flannelly, 96 Kan. 372, 833, 152 Pac. 22; 154 Pac. 235.

McKinney et al. v. Kansas Natural Gas Co., 206 Fed. 772.

Fidelity Title & Trust Co. v. Kansas Natural Gas Co. et al., 206 Fed. 772.

McKinney et al. v. Landon et al., 209 Fed. 300.

Fidelity Title & Trust Co. v. Landon et al., 209 Fed. 300.

Kansas City Pipe Line Co. et al. v. Fidelity Title & Trust Co. et al., 217 Fed. 187.

Landon et al. v. Kansas Natural Gas Co. et al., 217 Fed. 187.

Landon et al. v. McPherson, District Judge, 217 Fed. 187.

- Fidelity Title & Trust Co. v. Kansas Natural Gas Co. et al.*, 219 Fed. 614.
- McKinney v. Kansas Natural Gas Co.*, 219 Fed. 614.
- State of Kansas ex rel. v. The Wyandotte County Gas Company*, 88 Kan. 165, 127 Pac. 639.
- Wyandotte County Gas Company v. State of Kansas*, 231 U. S. 622.
- State ex rel. v. Litchfield*, 97 Kan. 592, 155 Pac. 814.
- State ex rel. v. Gas Co.*, 100 Kan. 593, 165 Pac. 1111.
- St. Joseph Gas Co. v. Barker, Atty. Gen., et al.*, 243 Fed. 206.
- Landon et al. v. Pub. Util. Comm. of Kansas et al.*, 234 Fed. 152.
- Landon v. Pub. Util. Comm. of Kansas*, 242 Fed. 658.
- Landon v. Pub. Util. Comm. of Kansas*, 245 Fed. 950.
- Public Utilities Commission for Kansas et al. v. Landon et al.*, 249 U. S. 236.
- Kansas City, Missouri, et al. v. Landon et al.*, 249 U. S. 236.
- Kansas City Gas Company et al. v. Kansas Natural Gas Company et al.*, 249 U. S. 236.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 411.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 423.
- Landon et al. v. Court of Industrial Relations of Kansas et al.*, 269 Fed. 433.
- State of Missouri ex rel., v. Kansas Natural Gas Co.*, 282 Fed. 341.
- State of Missouri ex rel. et al. v. Kansas Natural Gas Company*, No. 155, October, 1923, Term. U. S. Supreme Court.

State of Kansas v. Gas Co., 111 Kan. 809,
208 Pac. 622.

*Kansas Natural Gas Company v. State of
Kansas*, No. 133, October, 1923, Term.
U. S. Supreme Court.

*Central Trust Co. v. Consumers L. H. & P.
Co.*, 282 Fed. 680.

*State of Kansas v. Central Trust Co. of
New York*, No. 137, October, 1923, Term.
U. S. Supreme Court.

From the foregoing facts and authorities it clearly appears that the public welfare demands that the business, rates and service of said Supply Company should be regulated.

POINT II.

The Kansas Natural Gas Company is a public utility at common law.

What constitutes a public utility in point of fact is sometimes difficult to determine. The line of demarcation between a public business and a private business is not always clearly drawn in this country at this time. At common law railroads, warehouses, innkeepers, ferriers and auctioneers were well recognized public callings subject to regulation. As the states of this country began to develop and enlarge their functions, and organized society became more complex and the need of state regulation more pressing, the number of different callings that were considered public in their nature has rapidly increased so that today we have not only railroads but all common carriers of persons and property, including street railways, taxicab and bus-line companies, water companies, electric light and power companies, heating companies, telephone and telegraph companies, grain elevators, stock yard companies, stock commission companies, ice companies, insurance companies, banks, oil, gas and water pipeline companies, irrigation companies, and others which are deemed and considered to be so far public in their nature as to call for more or less restriction and regulation.

In *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, this court had occasion to render an exhaustive opinion distinguishing a private from a public business. In that case the syllabus reads:

"A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business."

* * * * *

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

In the opinion, the court said (p. 406):

"We may put aside, therefore, all merely adventitious considerations and come to the *bare and essential one*, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far *affected with a public interest* as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, *which makes the public interest* that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted gov-

ernmental power. The transmission of intelligence is of cognate character. There are other utilities which are denominated public, such as *the furnishing* of water and light, including in the latter *gas* and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. *The basis of the ready concession of the power of regulation is the public interest.*" (Italics ours.)

After discussing various kinds of business which had been adjudged public in their nature, the court said (p. 411):

"It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though *modern economic conditions may make necessary or beneficial its application.* In other words, to say that government possessed *at one time a greater power* to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today." (Italics ours.)

In *Terminal Taxicab Co. v Dist. of Col.*, 241 U. S. 252, May 22, 1916, this court again had occasion to distinguish between private and public business. In that case this court held that a Taxicab Company was a public utility subject to regulation "as to the terminal and hotel business, but not as to the garage business." The mark of distinction was that in its regular, fixed and uniform service back and forth between

hotels and railway stations it held itself out to serve all who applied at a regular and uniform rate, whereas its general garage and trip business to various parts of the city and country was a matter of private contract with each customer for each trip.

In the opinion (p. 254), the court said:

"The plaintiff is 'an agency for public use for the conveyance of persons,' etc.; and none the less that it only conveys one group of customers in one vehicle. The exception of the Terminal Company from the definition of common carriers does not matter. The plaintiff is not its servant and does not do business in its name or on its behalf. It simply hires special privileges and a part of the Station for business of its own.

The next item of the plaintiff's business, constituting about a quarter, is under contracts with hotels by which *it agrees to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel*, receiving the exclusive right to solicit in and about the hotel, but limiting its service to guests of the hotel. We do not perceive that this limitation removes the public character of the service, or takes it out of the definition in the act. No carrier serves all the public. His customers are limited by place, requirements, ability to pay and other facts. But *the public generally is free to go to hotels if it can afford to, as it is free to travel by rail, and through the hotel door to call on the plaintiff for a taxicab. We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand.*

We certainly may assume that in its own interest it does not attempt to do so. The service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389. See *Peck v. Tribune Co.*, 214 U. S. 185, 190." (Italics ours.)

In that case it is pertinent to note that the Taxicab Company agreed "*to furnish enough taxicabs and automobiles within certain hours reasonably to meet the needs of the hotel,*" and that the service was regular and uniform back and forth between railroad terminals and hotels at regular rates, and that through the hotel or the terminal station "*the public generally was entitled to the service of the Taxicab Company.*" It held itself out to *serve all who applied* within those limitations. This seems to be a rational basis upon which to distinguish a public from a private business.

In the instant case the Supply Company offers to serve all consumers and distributing companies on and along its lines who apply for service at a uniform, regular and published schedule of rates without negotiations, agreement or private contract.

In *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454, this court again points out that a public utility is a service or facility open to the public, that all the people within certain limits have the right to use it. At page 460 the court says:

"The declaration in the Constitution of 1879 that water appropriated for sale is appropriated to a public use must be taken according to its subject-matter. The use is not by the public at large, like that of the ocean for sailing, but by certain individuals for their private benefit respectively. (Citing authorities.) The declaration therefore does not necessarily mean more than that *the few within reach of the supply may demand it for a reasonable price.*" (Italics ours.)

So in the case at bar, any distributing company, the city itself or any individual within reach and on the supply lines may demand service at a reasonable rate.

The facts in the case at bar which characterize the Supply Company as a public utility within the adjudicated cases, are the following:

It has a complete monopoly on the supply of natural gas. (*Brass v. Stoesser* 153 U. S. 391; *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517.)

The business of the Supply Company is "affected with a public interest" (*German Alliance Ins. Co.*, 233 U. S. 389). It serves directly and indirectly approximately one-half million people (Rec. 40, par. 14).

The Supply Company occupies the public highways of the States of Kansas and Missouri. (Rec. 40, 103.)

It occupies the public streets of the cities served to the extent of maintaining pipelines therein for the delivery of gas to the distributing companies. (Rec. 39-40.)

It has the power of eminent domain. "Lands may be appropriated * * * for the piping of gas, in the same manner as is provided in this article for railway corporations." (Sec. 2194, G. S. Kan. 1915.)

It is licensed to do business in Kansas and Missouri (Rec. 88, 89) and is subject to the same regulation as a domestic corporation.

"Any corporation organized under the laws of another state, territory, or foreign country, and authorized to do business in this state, shall be subject to the same provisions, judicial control, restrictions, and penalties, except as herein provided, as corporations organized under the laws of this state. (L. 1907, ch. 140, Sec. 27, May 27)" G. S. 1915, Sec. 2140.

"The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State." Constitution of Missouri, Art. XII, Sec. 5.

It makes no private, individual or separate contracts for service with private consumers served along its lines and in the Joplin, Missouri, District, but serves them and charges a published schedule of rate (Rec. 39).

It now has no contract as to rates with any of the distributing companies it serves, said original contracts having been annulled as to rates by decree of court at the suit of said Supply Company (Rec. 73, 269 Fed. 423), and no other written contracts have been made between said Supply Company and the distributing companies.

It undertook by contracts (Rec. 41) to perform the public service of furnishing and supplying natural gas required by city ordinances (Rec. 11, par. 7).

It undertook that service for the full term of said ordinance, thirty years, or any extension or renewal thereof, practically in perpetuity (Rec. 41).

It undertook the furnishing of a full and complete supply of "natural gas in such amount as will at all times *fully supply the demand* for all purposes of consumption" (Rec. 41).

It undertook "so long as" it "is able to supply the same" to furnish and supply the Kansas City Gas Company "*all the gas they may need to fully supply the demand for domestic consumption* in said city" (Rec. 42).

It has *in fact* established and now maintains natural gas public service to the Kansas City Gas Company and some forty other public service companies, serving one-half million people (Rec. 40, par. 14).

Its contract obligations and its undertaking in fact was and is primarily "to furnish" natural gas. It is immaterial where such gas comes from.

Transportation is a necessary incident to the

business of *furnishing*. The accident of geography does not change the contract or the intent of the parties or the obligation of the Supply Company to *furnish* natural gas.

It has made local physical connections between its plant and system and the plants and systems of said local public utilities. (Rec. 39.)

It continuously furnishes and delivers and sells natural gas to the Kansas City Gas Company as needed and simultaneously with the demands of its customers (Rec. Landon Case, No. 330, October, 1918, Term, p. 812).

It employs licensed agencies of the state, public utilities, to sell and market its product.

In 1915 it filed an application with the Public Utilities Commission of Kansas (Rec. Landon Case, No. 330, October, 1918, Term, p. 54) to fix rates for the distributing companies it served on the unwarranted assumption that they were its mere agents and had no voice in the rates charged consumers. (249 U. S. 236.)

It filed its own schedule of rates, rules and regulations with the Public Service Commission of Missouri in 1913 as provided by the Public Service Commission Act of said State (Rec. 109-111).

Finally, and the controlling characteristic of a public utility, Taxicab case, *supra*, it offers service to all distributing companies, cities, towns, villages and consumers along its lines at a uniform, classified, promulgated and published "schedule of rates" and charges. Record page 72 shows a "Schedule of Rates for Sale of Gas by the Re-

ceiver of the Kansas Natural Gas Company to Distributing Companies," thus publishing in the same manner that any public utility publishes its "schedule of rates." This notice runs "*To All Distributing Companies Supplying Natural Gas to All Cities Named Below.*" It is not addressed to any particular distributing company. It does not propose a private contract with any company. Neither the caption nor the body of the notice carries the name of any distributing company. It is wholly immaterial to the Supply Company who or what the distributing company is. The notice further reads: "You will take notice that from and after March 25, 1920, and until further notice, the following Schedule of Net Rates will be charged for natural gas delivered into the plants of the respective distributing companies at the measuring stations located at the connection between the distributing plant and the pipe line system operated by the Receiver, which are classified into zones as follows:" Then there are three zones with three different classes of rates, yet no distributing company is named in any of these zones, nor is anything in the nature of a private contract or agreement suggested; but merely rates named, "applying to" various *cities and towns* located in said several zones. Its private consumers along the lines are given the same rates "as are charged *city consumers* in the city situated nearest to them." This promulgated and published offer and schedule of rates runs to all distributing companies, cities, towns and consumers on the Supply Company's lines, classifying

them into three zones, on "Field lines and towns," "Southern Trunk," "Northern Trunk and branches."

Nothing could be a more general and unrestricted offer to serve *all who apply* for gas than this formal published notice and schedule (Rec. 72).

The notice of increase complained of in this suit (Rec. 95) was also general in form, arbitrary in fact, suggested no contract and identical notices were sent to all distributing companies raising said rate to 40 cents per thousand cubic feet (Rec. 12, par. 10) and (Rec. in Kansas Case, No. 133, p. 6, par. 33; 12, par. 4).

The conclusion on this head is that the Supply Company is in fact and at common law a public utility subject to regulation.

POINT III.

The Kansas Natural Gas Company is declared by statutes to be a public utility.

The Kansas Public Utilities Act (Laws of Kansas, 1911, Chap. 238; G. S. 1915, Chap. 97) provides:

"The term 'public utility,' as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, *except for private use, any equipment, plant, generating machinery, or any part thereof, for * * ** the conveyance of oil and *gas through pipe lines* in or through any part of the state. * * *" (G. S. 1915, Sec. 8329; Laws of Kan. 1911, Chap. 238, Sec. 3).

The Commission is given general jurisdiction over both rates and service of all public utilities and is also authorized to fix "joint rates" for all public utilities.

The Missouri Public Service Commission Act (Laws of Missouri 1913, p. 557, R. S. Mo. 1919, Chap. 95) provides:

"10. The term '*gas plant*,' when used in this chapter, *includes* all real estate, *fixtures and personal property* owned, operated, controlled, used or to be used for or *in connection*

with or to facilitate the manufacture, distribution, sale or furnishing of gas (natural or manufactured) for light, heat or power.

11. The term 'gas corporation,' when used in this chapter, includes every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any *gas plant operating for public use* under *privilege, license* or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof." (R. S. Mo. 1919, Sec. 10411, subd. 10 and 11, Laws of Missouri 1913, p. 558.) (Italics ours.)

The Supply Company may contend here that the Missouri Act does not cover the plant and business of said Company, but that point was not raised in the answer (Rec. 10) nor in the evidence or argument, nor was it decided by the court below (Rec. 26, 123). It "has no franchise granted by the City of Kansas City, Missouri, authorizing it to occupy the streets, alleys or public places upon and along which to lay and maintain its pipe lines" (Rec. 40), but the above Act extends to all gas corporations controlling or managing any gas plant operating "*for public use*" under "*privilege, license* or franchise."

The Supply Company is licensed to do business in the State (Rec. 90). It occupies the public highways and the streets of the cities presumably with at least a license or consent; at least it is

estopped to claim that it is a trespasser or wrongfully upon the public ways.

In *International Trust Co. v. American L. & T. Co.*, 62 Minn. 501, 503, 65 N. W. 78, 79, the court said:

"A privilege, as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special privilege conferred by the state, which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority."

In the instant case, the Supply Company exercises the special privilege and monopoly of furnishing natural gas to numerous cities and towns; it is licensed by the state to do such business; it occupies the public streets of the cities to a limited extent under its supply contracts and by authority, leave, license and consent of the municipalities it serves. The Missouri Act clearly and comprehensively covers this situation. Any corporation, domestic or foreign, doing business in the State of Missouri, consents to reasonable state regulation under Section 5, Article 12, of its Constitution: "The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well being of the state."

Art. I, Sec. 2, Laws 1913, p. 560 (R. S. Mo. 1919, Sec. 10411, subd. 25 and 26) provides:

"25. The term 'public utility,' when used in this chapter, includes every common carrier, *pipe line corporation, gas corporation, * * ** as these terms are defined in this section, and each thereof is hereby *declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission* and to the provisions of this chapter.

"26. The term 'service,' when used in this chapter, is used *in its broadest and most inclusive sense*, and includes not only the use and accommodation afforded consumers or patrons, but also *any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and devoted to the public purposes of such corporation, person or public utility and to the use and accommodation of consumers or patrons.*" (Italics ours.)

Art. IV, Sec. 68, Laws 1913, p. 602 (R. S. Mo. 1919, Sec. 10477, subd. 1 and 3) provides:

"Every gas corporation * * * shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. * * * Every unjust or unreasonable charge made or demanded for gas, electricity, water or any such service, or in connection there-

with, or in excess of that allowed by law or by order or decision of the commission is prohibited. * * *

"No gas corporation * * * shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Art. IV, Sec. 69, Laws 1913, p. 603 (R. S. Mo. 1919, Sec. 10478) provides:

"The commission shall: 1. Have general supervision of all *gas corporations*, electrical corporations and water corporations having authority under any *special* or *general law* or under any charter or franchise to lay down, erect or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, *for the purpose of furnishing* or distributing water or *gas* * * * and all *gas plants* * * * owned, leased or operated by any gas corporation * * *"

Art. IV, Sec. 69-12, Laws 1913 (R. S. Mo. 1919, Sec. 10478-12) provides:

"The commission shall have power to require every gas corporation * * * *to file with the commission and to print and keep open to public inspection schedules showing*

*all rates and charges made, established or enforced or to be charged or enforced, all forms of contract or agreement and all rules and regulations relating to rates, charges or service used or to be used, and all general privileges and facilities granted or allowed by such gas corporation. * * * Unless the commission otherwise orders, no change shall be made in any rate or charge, or in any form of contract or agreement, or any rule or regulation relating to any rate, charge or service, or in any general privilege or facility, which shall have been filed and published by a gas corporation * * * in compliance with an order or decision of the commission, except after thirty days' notice to the commission and publication for thirty days as required by order of the commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation or municipality shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such services as specified in its schedule filed and in effect at the time. * * * The commission shall have power to prescribe the form of every such schedule, and from time to time prescribe by order such changes in the form thereof as may be deemed wise."*

Art. IV, Sec. 70, Laws 1913 (R. S. Mo. 1919, Sec. 10479) provides:

"Whenever there shall be filed with the commission by any gas corporation, electrical corporation, water corporation or municipality any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested gas corporation, electrical corporation, water corporation or municipality, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission upon filing with such schedule, and delivering to the gas corporation, electrical corporation, water corporation or municipality affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the commission may make such

order in reference to such rate, charge, form of contract or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective: PROVIDED, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding six months."

Art. VII, Sec. 127, Laws 1913, p. 648 (R. S. Mo. 1919, Sec. 10538) provides:

"The provisions of this chapter shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities."

This Act was liberally construed by the Supreme Court of Missouri in *State ex inf. v. Kansas City Gas Company*, 254 Mo. 515, 163 S. W. 854, as follows:

"That act is an elaborate law bottomed on the police power. It evidences a public policy hammered out on the anvil of public discussion. It apparently recognizes certain generally accepted economic principles and conditions, to-wit, that a public utility (like gas, water, car service, etc.) is in its nature a monopoly; that competition is inadequate to protect the public, and, if it exists, is likely to become an economic waste; that State regulation takes the place of and stands for competition; that such regulation, to command respect from patron or utility-owner, must be in the name of the overlord, the

State, and to be effective must possess the power of intelligent visitation and the plenary supervision of every business feature to be finally (however invisibly) reflected in rates and quality of service. It recognizes that every expenditure, every dereliction, every share of stock or bond or note issued as surely is finally reflected in rates and quality of service to the public, as does the moisture which arises in the atmosphere finally descend in rain upon the just and unjust willy nilly.

That there had been a vast increase in such utilities in the last decade or two and that evils have grown up crying out lustily for a cure by the lawmaker, is writ large in current history. The act, then, is a highly remedial one filling a manifest want, is worthy a hopeful future, and on well-settled legal principles is to be liberally construed to further its life and purpose by advancing the benefits in view and retarding the mischiefs struck at—all *pro bono publico*. Besides all which, the lawmaker himself has prescribed it 'shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between the patrons and public utilities.' (Sec. 127)." (254 Mo. 515, 534.)

* * * * *

"The commission is better equipped with experts, technical knowledge, and other efficient aids to a neutral and full investigation than would be any commissioner appointed by the court. Its visitorial and administrative powers are so vast and so flexible as to mold its procedure and orders to the pressure of the real facts found to exist. Heavy penalties follow disobedience to its orders as

a spur to obedience. It has full machinery to compel discovery and the law coerces compliance. The matter touching the business of going concerns, the hearings are not hampered or clogged by technicalities, but businesslike simplicity, speed and efficiency are provided for as were seemly and meet. Persons and corporations unjustly affected by the orders and proceedings have a quick remedy by rehearing, by review in court and by appeal here. *He who reads that act and does not see a complete rounded scheme for dealing with the business of public utilities at every spot where the shoe pinches the public or the utility, reads it to little purpose.* He who reads it and does not see that the yearning of the lawmaker was to have the courts trust the commission in the first instance to solve such business problems, as those presented in this case, reads it to still less purpose." (254 Mo. 515, 540.)

The Kansas Supreme Court likewise construed the Kansas Act very liberally. In *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, after citing the statute at length, the court says (p. 303):

"It will be seen from the foregoing statutes that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The public utilities commission, succeeding to all the powers conferred upon the state board of railroad commissioners, and by its own enlarged powers conferred by later enactments, has power to supervise the conduct of public service corporations in this commonwealth."

See also *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606; affirmed in *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262; *The State v. Railway Co.*, 81 Kan. 430, 105 Pac. 704; *Railway Co. v. Railway Commissioners*, 85 Kan. 229, 116 Pac. 506; *The State ex rel. v. Railroad Companies*, 85 Kan. 649, 118 Pac. 872; *Winfield v. Court of Industrial Relations*, 111 Kan. 580, 207 Pac. 813; *State ex rel. v. Wyandotte Gas Company*, 88 Kan. 165, 172 Pac. 639, affirmed by this court in 231 U. S. 622; *State ex rel. v. Gas Co.*, 111 Kan. 809, 208 Pac. 622.

Similar statutes giving jurisdiction to state commissions over such natural gas supply companies have been enacted in all the states of the Union where natural gas supply companies exist and are doing business. *Pennsylvania Gas Co. v. Pub. Serv. Comm.*, 252 U. S. 23; *Pennsylvania v. West Virginia*, 262 U. S. 553.

In *German Alliance Ins. Co. v. Kansas*, 233 U. S. 384, this court said:

"What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy."

The conclusion on this head is that the law-makers of the states have declared natural gas supply companies to be public utilities requiring public regulation and that such declared public policy is not open to judicial review.

Southwestern Oklahoma Power Co.
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Commission 220 Pac 370

POINT IV.

Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

It has always been conceded by appellants and oft decreed by courts that the purchase and production of natural gas in one state and the transmission and sale thereof in another is interstate commerce; and that state legislation, designed primarily to prohibit commerce in natural gas or to discriminate in favor of one state and its inhabitants as against another, infringes upon the commerce clause of the Federal Constitution. In our brief in the Landon case in this court, p. 94, we said: "It is also settled that the right of carrying natural gas from one state into another is the right of conducting traffic and commercial intercourse in natural gas between states and cannot be prohibited under color of the police power of the state." These principles have been fully settled by this court. *West v. Kans. Natl. Gas Co.*, 221 U. S. 229; *Haskell v. Kans. Natl. Gas Co.*, 224 U. S. 217. *Pennsylvania v. West Virginia*, 262 U. S. 553. *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23.

The question remaining is whether or not this interstate commerce in natural gas is "national" in its character and subject to regulation only by

Congress or "local" in its nature and subject to regulation by the states.

The answer to that question is found in the following facts of record:

The record shows that the Supply Company has a complete monopoly (Rec. 4, 11) of the supply of natural gas to some forty cities, towns and villages in Eastern Kansas and Western Missouri, and serves one-half million people; that said distributing companies have no other source of supply of natural gas, that the primary undertaking and duty of the Supply Company is to furnish natural gas (Rec. 41). It is immaterial where that gas comes from. The duty, bottomed on the original supply-contracts (Rec. 41) maintained by the Receivers while the business was in *custodia legis* and continued by the Supply Company, since, was to furnish natural gas. The furnishing is local to the Kansas City Gas Company and other distributing companies and at Kansas City (Rec. 41) and some forty other cities and communities served. The furnishing of this gas "is peculiarly of local concern."

It is for the inhabitants of the cities served as distinguished from the public at large. It "makes provision for local needs" by undertaking the supply of gas provided for in local natural gas franchise ordinances, granted to distributing companies (Rec. 41-49); and "pertains to a local public service." It is delivered to and through the instrumentality of local licensed agencies, public service companies of the states.

This natural gas is so peculiarly local in its nature and restricted in its uses and method of handling, that it cannot be reconsigned and transported on past the points of delivery to some other market but must be sold and consumed, if at all, in a comparatively restricted area.

Permanent physical connections are made and must be maintained between the plant and pipe line system of the Supply Company and the public service companies served (Rec. 39).

Local measuring stations and meters are and must be maintained and operated at or within the town borders of the cities served, where the gas is locally, daily, hourly, momentarily and continuously delivered and sold by the Supply Company to meet the consumers' instantaneous demands upon the distributing companies.

The Supply Company occupies the public highways of the states (Rec. 40) and exercises the power of eminent domain, and occupies the public streets at the point of delivery, with the license or acquiescence of the cities, towns and villages served (Rec. 39).

There are no advance orders for natural gas (Rec. 40) but it is delivered "instanter" (Rec. Landon case No. 330, October, 1918 Term, p. 812) as required by the customers, singly and in aggregate, twenty-four hours a day, three hundred and sixty-five days in the year.

The Supply Company offers service to all consumers, distributing companies, cities and towns on its lines who apply (Rec. 109-111).

It has and makes no special contracts with any consumer or distributing company.

Its original gas-supply-contracts were at its own suit annulled and set aside as to rates, but the service established under those contracts continues in full force and effect and it accepts the benefits and fruits of that business.

It furnishes and sells natural gas not under private negotiation and contract, but upon promulgated and published schedules of uniform rates.

The foregoing facts of record clearly bring this case within the class of cases local in their nature and subject to state regulation as laid down in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 29-31:

"In dealing with interstate commerce it is not in some instances regarded as an infringement upon the authority delegated to Congress, to permit the States to pass laws indirectly affecting such commerce, *when needed to protect or regulate matters of local interest*. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases, 230 U. S. 352. The paramount authority of Congress over the regulation of interstate commerce was again asserted in those cases. It was nevertheless recognized that *there existed in the States a permissible exercise of authority, which they might use until Congress had taken possession of the field of regulation.*

After stating the limitations upon state authority, of this subject, we said (p. 402): 'But within these limitations *there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction* although interstate commerce may be affected. *It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention.* Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government *because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies;* hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that *the States should continue to supply the needed rules* until Congress should decide to supersede them. * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. *Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals* because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.

In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from federal control. C. 309, Sec. 7, 36 Stat. 539, 544.

The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, *is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.*

This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power

of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers *is required in the public interest* and has not been attempted under the superior authority of Congress.

It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character." (Italics ours.)

The foregoing language applies in every particular, to the Supply Company in the instant case, except that the title of the gas changes where it passes from the Supply Company's pipe lines in the public streets to the distributing companies' mains in the public streets.

Now it is well settled law that the character and classification of commerce whether interstate or intrastate, national or local is not determined or affected by the change of carriers. *Texas & N. O. R. R. Co. v. Sabine Tram. Co.*, 227 U. S. 111; *So. Covington Ry. v. Covington*, 235 U. S. 537; *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371.

It is equally well settled that such classification of commerce is not determined or made upon the basis of ownership or change of title of the commodity in transit. *Swift & Co. v. United States*, 196 U. S. 375; *Gulf Ry. v. Texas*, 204 U. S. 403; *Atchison & Topeka Ry. Co. v. Harold*, 241 U. S. 371.

In the Texas case, *supra*, Justice Brewer said:

"It is undoubtedly true that the character of a shipment, whether local or interstate, is not changed by a transfer of title during the transportation."

The character of the commerce carried on by the Supply Company is wholly immaterial in this case. There is no contract between consignor and consignee; there are no bills-of-lading; there are no contracts to transport gas from Oklahoma to Missouri. The essential undertaking of the Supply Company on the record as it now stands is "to furnish" natural gas at Kansas City and at some forty or more other cities to said local distributing companies; and to furnish that gas under a published and promulgated schedule of rates—not under privately negotiated special contracts.

A case squarely in point is, *North Carolina Pub. Serv. Comm. v. So. Power Co.*, 282 Fed. 837. The defendant was a New Jersey corporation operating a large hydro-electric power plant in North Carolina. It furnished, delivered and sold power at the city gates of numerous cities for local distribution and sale. The local companies' rates were regulated by the State Commission. The Supply Company notified the distribution companies of increased rates and threatened to shut off the current if not promptly paid. The court held that the Supply Company was a public service corporation doing a business affected with a public interest and that it could not increase its city gates' rates to the distributing companies without the approval of the State Commission.

There is a line of analogous liquor cases which establish the principle that before the Supply Company can successfully claim that the business of furnishing and selling natural gas shipped interstate is free from state control, it must show that said sales take place or are confirmed or consummated in the foreign state, and that said Supply Company is not locally selling and locally delivering said gas to meet the immediate, instantaneous, simultaneous and indiscriminate demands of its customers or its customers' customers. *Heyman v. Hays*, 236 U. S. 178; *In re: Rahrer*, 140 U. S. 545; *McDermott v. Wisconsin*, 228 U. S. 115. This the Supply Company cannot do in this case. The entire transaction, the purchase, the sale, the delivery, the measurement, the furnishing and the payment are local and within the territorial boundaries of the regulating state.

The Supply Company's business is not capable of one uniform system of regulation.

State of Kansas ex rel. v. Flannelly, 96 Kans. 372; 152 Pac. 22; P. U. R. 1916C, 810.

Manufacturers' Light & Heat Co. v. Ott, 215 Fed. 940, 944.

Jamieson v. Indiana Natural Gas & Oil Co., 128 Ind., 555, 28 N. E. 96.

Mill Creek Coal & Coke Co. v. Pub. Serv. Comm., 7 A. L. R. 1081, 1. c. 1091, 100 S. E. 557, 562.

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The fixing of natural gas rates is not the fixing of freight rates. It is not the fixing of the cost of transportation. It is the fixing of commodity rates—selling rates of a commodity locally. It must of necessity vary in each city served, depending upon the volume of business done, the character and classification of consumers and numerous other factors entering into and reflected in commodity prices. Transportation is a mere incident.

In *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm.*, *supra*, the court said:

“The duty of the power company to sell at reasonable rates was owed to the citizens of Virginia and to the public in this state (West Va.). But the two duties do not overlap, as they do where rates of transportation are concerned. *The price at which a commodity is sold is essentially local*, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside the community.” (Italics ours.)

The maintenance of the Supply Company's supply of gas within the city, its pipe lines in and upon the city's streets and its meters within or near the city, continuously ready to serve, constitutes an implied standing offer to deliver, measure and sell locally at reasonable and authorized rates; the turning of the consumers' burner cocks and the drawing of the gas from the mains of the distributing company and in turn the delivery of the gas by the Supply Company into the

mains of the distributing company, constitutes an acceptance of that offer and an implied promise to pay a reasonable or authorized city gates' rate. These entire transactions are purely local.

There is no claim in these cases that any state, commission or city is or has attempted, by regulation, legislation or otherwise, to discriminate against any consumers or localities or to prohibit the movement of natural gas from one state into another. On the contrary, this action is maintained for the purpose of requiring the Supply Company to file its rates with the Commission as provided by law and to show said Commission by competent evidence the merits of its demands so as to enable the Commission to allow it and said distributing companies reasonable and compensatory rates; and to enjoin the Supply Company from enforcing its demands by the destructive arbiter of force instead of the constructive rule of reason. The regulation here sought is the same form of modern, constructive regulation prescribed in forty-seven states of this Union.

From a practical standpoint, there is no insuperable difficulty in the way of the Commissions of both Kansas and Missouri determining with reasonable accuracy the reasonable city gates rates for natural gas furnished by the Supply Company. The plant value, operating costs and reasonable net returns of said Supply Company may easily be allocated between the two states and the various cities served on the basis of the number of consumers' meters installed, or the volume of gas sold or any other commonly accepted unit.

It must be presumed that rates fixed by the Commission are reasonable and compensatory. The Commission Act so requires and the ordinary course presumes it. That presumption prevails until the contrary is proven. It follows that if the rates fixed are non-confiscatory and reasonable they cannot be an undue burden upon or unreasonable interference with interstate commerce.

The conclusion on this head must be that the interstate commerce in natural gas in this case is local in its nature and therefore subject to reasonable state regulation.

POINT V.

The specific exclusion of interstate commerce in natural gas from the Act of Congress regulating interstate commerce, implies regulation by the states until Congress acts.

The Pennsylvania Case above quoted fully establishes this principle.

Referring to the Minnesota Rate Cases, which by the way dealt only with the general freight rates, and had nothing to do with commodity rates either local or interstate, this court (p. 29) said:

"It was nevertheless recognized that there existed in the state a permissible exercise of authority, which they might use *until Congress had taken possession of the field of regulation*. After stating the limitations upon state authority of this subject, we said (p. 402): 'But within these limitations there necessarily remains to the States, *until Congress acts*, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to *which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention*. Thus there are certain subjects having the most obvious and *direct* relation to interstate commerce, which nevertheless, *with the acquiescence of Congress*, have been controlled by state legislation from the foundation of the

Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, *the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them.* * * * Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope *without unnecessary loss of local efficiency.* Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The rates of gas companies transmitting gas in interstate commerce are not only not regulated by Congress, but the Interstate Commerce Act expressly withholds the subject from Federal control. C. 309, Sec. 7, 36 Stat. 539, 544." (Italics ours.)

The Interstate Commerce Act provides (Sec. 1):

"The provisions of this act shall apply to common carriers engaged in * * * the transportation of oil or other commodities except water and except natural or artificial gas by pipe line or partly by pipe line and partly by railroad or by water."

If Congress had intended gas supply companies to go free from all regulation, it would not have mentioned them in the Interstate Commerce Act. They would have been left with the countless other subjects and instruments of interstate commerce in the general body of commerce of the Nation. To mention them suggests that they need regulation. It is impossible to derive from the Constitutional grant, under the facts and record of this case, an intention that they should go uncontrolled pending Federal intervention. Here, too, must be remembered the localizing characteristics of the Supply Company above enumerated.

The conclusion on this head must be that the specific exclusion of gas supply companies from the Interstate Commerce Act implies the acquiescence of Congress in state control.

POINT VI.

An importer who employs a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation.

It cannot be too strongly impressed or too oft reiterated that the Supply Company, in the last analysis, is not primarily engaged in interstate commerce at all. It is engaged in the business of *furnishing* natural gas locally to local distributing companies for local use. It does not seek an open market where commodities generally are bought and sold. The general body of the public at large are not its customers. It did originally by contract, it had at the time of the trial below, and it always must make arrangements, by contract or agreement, express or implied, with some local public utility, some licensed agency of the state, performing a public service, in order to market its products shipped interstate.

Its original supply contracts with the Kansas City and other distributing companies, undertook to furnish natural gas pursuant to and in accordance with and at the rate specified in a certain city ordinance thereto attached, granting the use of the public streets to a local public utility (Rec. 41). Similar arrangements were made with all other local companies. (Rec. 12.)

In the Landon Case, *supra*, this court found, on the record, that:

"During the years 1904-1908, by separate agreements, it undertook to supply many local companies with gas; * * * that the receivers took over the Supply Company's property, affairs and business and operated them under orders of the court without specifically adopting or disallowing the supply-contracts of 1904 and 1908; they continued to deliver gas to local distributing companies and to accept payments as *originally agreed*." (Italics ours.)

Mark well—this was the status of the Supply Company at the time of the decision in the Landon Case.

In the Kansas Case, the Supply Company in its return and answer to the alternative writ of mandamus (Rec. in that case p. 13) says: "That said Kansas Natural Gas Company * * * sells gas to distributing companies at the respective city gates for an *agreed price*."

From which it appears that the Supply Company always has, does now, and ever will be under the necessity of using and employing licensed agencies of the states, public utilities having franchises, to market its imports. Such an importer is not engaged in interstate commerce of a national character but is engaged in local trade and traffic subject to state regulation.

This principle was clearly announced by that great expounder of the Constitution, Chief Justice Marshall, in the early case of *Brown v. State of Maryland*, 12 Wheat. 419, at 443, thus:

"So if he (importer) sells by auction, auctioneers are persons licensed by the state, and if the importer chooses to employ them he can as little object to paying for this service as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation without annexing to it also the privilege of using the officers licensed by the state to make sales in a peculiar way. The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is undoubtedly an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state."

The furnishing of gas or other public utilities to the inhabitants of the city is a *state function* kindred to building roads and paving streets over which the state alone has control. In *Field v. Barber Asphalt Co.*, 194 U. S. 618, the claim

was made that a Missouri statute was void because it authorized the common council to name the brand of material in paving contracts, thereby excluding an imported asphalt from competition with other asphalts. The Court held (page 622) that while the statute operated to exclude Trinidad Lake asphalt from the State, it was a proper and rightful exercise of the state's power; that legislation of a state may in a great variety of ways affect commerce and persons engaged in commerce without constituting a regulation of it within the meaning of the Constitution (*Pa. Rd. Co. v. Hughes*, 191 U. S. 477), and that the right of the state in the exercise of its police power to make regulations which affect interstate commerce has frequently been sustained.

Certainly the right of the Supply Company to engage in interstate commerce is not so supreme, paramount and over-towering that it transcends and supersedes the sovereign right of the states and their municipalities and the property right of their public service corporations from any voice in determining the kind and character of gas they desire, whether natural, manufactured, coal gas, water gas or any other kind of gas.

Yet the irresistible *deductio ad absurdum* of the Supply Company's claim is that its right to import gas carries with it the unrestricted right not only to raise, lower and fix its rates but, at its own will and caprice, to supply or refuse to supply and to shut off gas and to change the quality, kind, character and quantity of gas and service in and to said states and some forty pub-

lic service corporations and forty or more cities, towns and villages and one-half million people willy nilly; for, if the state has no power to regulate the rates, it has none to regulate the quality or character of service or to determine the use of gas, or to exclude such use altogether.

Such a conclusion is unthinkable in our dual system of government with its many checks and balances on personal rights and governmental powers.

The conclusion on this head must be that, at least, so long as said Supply Company is engaged in business in the States of Missouri and Kansas and until it is ready to withdraw wholly and permanently from doing business in said states on reasonable terms as fixed by statute or by some competent public authority; and so long as it employs the public utilities of said states directly or indirectly to market its product, it consents to reasonable state regulation.

POINT VII.

The decision in *Public Utilities Commission et al. v. Landon, Receiver of the Kansas Natural Gas Company*, 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates or fixed by contract, and the challenged rates, then before this court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the *Kansas Natural Gas Company* was then or is at this time, on the record now before this court, free from state regulation.

There were four separate appeals in the so-called Landon Case; two by the Public Utilities Commission of Kansas; one by the Public Service Commission of Missouri and the City of Kansas City, Missouri, and one by the Kansas City Gas Company and The Wyandotte County Gas Company; all on a joint record. Counsel for said Kansas City Gas Company and Wyandotte County Gas Company in that case urged upon the attention of the court, both in oral argument and brief, *that the question of interstate commerce was immaterial to a decision in that case* and that the Receiver and Kansas Natural Gas Company, both parties to said proceeding, *had no cause of action* and were in no position to complain of the challenged rates because, as the record then stood, their compensation was fixed by contracts still in

force and effect and the rates complained of were fixed for and on behalf of the distributing companies and not the Supply Company.

In our brief in this court in that case, No. 330, October, 1918 Term, p. 61, we said:

"The following *fatal infirmities* in the plaintiff's case are disclosed by the record and will be discussed in this order:

1. The Kansas Natural Gas Company's *price* for gas was *contractual*, and it had no legal or *actionable right*, title or interest in the *rates* charged by the Kansas City and Wyandotte County Gas Companies to their patrons.

2. The Receiver's *price* for gas is *contractual*, and he has no legal or *actionable right*, title or interest in the rates charged by said local companies to their patrons.

3. The Wyandotte County Gas Company's rate for natural gas is legislative.

4. The Kansas City Gas Company's rate for natural gas is legislative.

5. The price paid by the Kansas City Gas Company and the Wyandotte County Gas Company to the Receiver and Kansas Natural Gas Company for gas is an item of operating cost of said local companies to be considered and approved by the state commissions in making rates for said local companies.

6. The question of interstate commerce is *immaterial, remote, incidental*. Reasonable regulation of public utility rates, including the allowance or disallowance of items of operating cost purchased interstate, is not burdensome regulation of interstate commerce.

7. The Receiver and Kansas Natural Gas

Company offered no evidence of any agreement with the local companies *to modify their supply-contracts or to increase the price* to be paid by the local companies to the supply-company for the gas furnished."

We then quoted at length from the record and the decrees appealed from, showing that the supply-contracts fixed the Supply Company's compensation, had been continued in effect by the Receiver and had never been disavowed or cancelled at the date of said proceedings.

This court took that view of the case and ordered the bills dismissed (249 U. S. 236, 246):

"The challenged orders related directly to prices for gas at burner tips and only indirectly to the Receiver's business. They were under no compulsion to accept unremunerative prices; even the original supply-contracts had not been adopted and were subject to rejection. Our conclusion concerning relationship between the Receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter. The Receivers are in no position to complain of them."

Counsel for the Supply Company attach much importance to the words "directly" and "indirectly" in the above decision, attempting to classify interstate commerce as national or local in character by the use of that one word in this decision. To those familiar with the trial, record, oral argument and briefs in that case, it is apparent that

those terms do not refer to the question of commerce at all, but to the *relationship* then existing "under the facts here disclosed" (opinion p. 245) between the Supply Company and the distributing companies. The following language demonstrates that fact: "They (the Receivers) were under no *compulsion* to accept *unremunerative prices*."

That word "*compulsion*" is used advisedly, cautiously, technically and upon consideration of the record facts in the case. The challenged orders *were* compulsory, upon the distributing companies, because made for them and by sovereign power; but not upon the Supply Company, because its rates were contractual—"consent rates"—then on the record before the court. The contracts had not been "rejected."

The word "*unremunerative*" is also used advisedly, technically and upon consideration of the record. "Unremunerative" means unprofitable or unattractive from the standpoint of consenting and contracting parties. It is not synonymous with confiscatory—imposed by sovereign power and not affording a fair return.

Even the word "prices" is used, as distinguished from "rates," the former meaning an agreed basis of exchange and the latter meaning an enforced exchange.

"Even the *original* supply-contracts had not been adopted and were *subject to rejection*," shows beyond cavil that the court was considering the contractual relation of the parties, as the record then disclosed, and was not ruling on the question of interstate commerce. This is still further

intensified by: *"Our conclusion concerning relationship between the Receivers and local companies renders it unnecessary to discuss the effect of rates prescribed for the latter."* What the court very clearly means, as disclosed by the record, was that the relationship then existing was contractual, the Supply Company's price was fixed by contract, the Receivers had continued that contract in effect to the day of the trial, the challenged rates were made for the distributing companies, the Supply Company could not participate in any increase while the contracts were in existence and therefore the question of interstate commerce was immaterial to the Receiver and *"renders it unnecessary to discuss the effect of rates prescribed for" the distributing companies upon the Supply Company.* "The Receivers were in no position to complain of them"—they had no cause of action.

The decrees appealed from in that case show that those contracts fixed the relation between the Supply Company and the distributing companies and were in force and effect at the time the rate orders complained of were made and said case heard.

Quoting further from our brief before this court in the Landon Case, No. 330, October, 1918 Term (249 U. S. 236):

"In the decree against the 'Kansas defendants' (Rec. 600) it is said:

'Nothing contained in this decree, nor in the opinion upon which it is based, shall be construed as determining the rights of any of

the Missouri defendants, touching the question of interstate commerce, or *the status of the distributing companies' contracts in Kansas or Missouri.*' (Rec. 604.)"

In the opinion on the final decree appealed here (Rec. Landon case 615) the trial court said:

"Now, whether these contracts were originally valid or invalid, and whether they became *functi officio* even if they were valid in their inception, are questions that it is not necessary for the court to decide at this time. The Kansas Natural Gas Company has in its pleadings prayed to have these contracts set aside as to it. I do not deem it advisable at this time to make any decision with regard to *the validity of the contracts as between the original parties to them*, whether they are still valid, whether they have ceased to be valid or whether they were invalid in their inception. While I shall deny the prayer of the Kansas Natural Company at this time it will be without prejudice to any action on the part of that company that it may see fit to take, whether in the cases that are pending in this court No. 1351, Equity, or No. 1 Equity, or otherwise. If it should see fit to take proper action to determine the validity of these contracts this decision will not prejudice it from so doing." (Rec. Landon case 620; 245 Fed. 956.)

If, in the Landon Case, this court had taken the Receiver's view, that his title of the gas extended to the consumers' meters, then the decision

would, of necessity, have been the same as the decision in the Pennsylvania case, to-wit, that the Commission had jurisdiction over the rates of both the Receiver and the local company and could fix separate or joint rates as the case required. But the Commission in that case had not fixed joint rates or any rates in which the Receiver could have an interest, "on the record then before the court." Obviously, the regulation of the whole business includes the regulation of all its parts. Therefore, if the Commission had jurisdiction in the Pennsylvania Case to regulate the selling rates to consumers of *interstate gas*, it can here fix reasonable city gates rates for such gas. The city gates rates are directly reflected in the consumers' rates. (See the decree appealed from allowing five-cent increase to both the Supply Company and the Kansas City Gas Company, Rec. 26.)

It is important to note that this court did not say that natural gas sold in interstate commerce is wholly free from state regulation. It said that it was free from *unreasonable* interference by the state. That is equivalent to a finding that the gas sold by the Supply Company to local companies is free from *confiscatory* regulation. The word "unreasonable" under the due process clause means "confiscatory." If the court in that case had intended to hold that interstate commerce in natural gas was national in character and wholly free from state regulation, it would not have qualified that statement by the word "unreasonable."

Could it be contended in the Pennsylvania Case that state regulation in the interest of public welfare could be defeated by the segregating in ownership of the supply properties from the distribution properties by the simple subterfuge of the sale or assignment of the pipe line properties. Can it be contended in the case at bar that by the simple merger of title of the Supply Company's properties and the distribution companies' properties, the police power of the state is enlarged from the mere regulation of the distribution companies to the regulation of the Supply Company. The police power of the state is not so fickle and frivolous as to be so lightly thwarted or enlarged.

So far as this court went in that case it sustained the regulatory powers of the State Commissions. On the record before the court it could not have done more. There were no rates made for the Supply Company.

What this court said in that case was that the Supply Company's title to the gas ended at the point of delivery and that it therefore could not, without a new contract, without some Commission order and without any consent of the distributors, arbitrarily superimpose its will upon said companies and dominate their proceedings and rights before the Commissions and courts.

POINT VIII.

A public utility or one conducting a business affected with the public interest may not arbitrarily discontinue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

It is well settled common law that a public utility or one conducting a business affected with the public interest may not arbitrarily deny or discontinue a public service for the non-payment of a controverted bill.

In the Taxicab Case, *supra*, this court said (p. 255):

"We should hesitate to believe that either its contract or its public duty allowed it arbitrarily to refuse to carry a guest upon demand."

In *Landon v. Pub. Util. Comm.*, 242 Fed. 658, 690, Judge Booth, after holding that the business of the Supply Company was interstate commerce and free from Commission regulation, said:

"This does not necessarily mean that the Receiver or the Company (Kansas Natural Gas Company) after the receivership can fix rates at their discretion. There still remains remedies for unreasonable rates. See *Covington Bridge Co. v. Kentucky*, 154 U. S. 204."

In the Bridge Company Case just cited, this court, after holding that a connecting bridge between Ohio and Kentucky was an instrument of interstate commerce and free from state control, said (p. 222):

"We do not wish to be understood as saying that, in the absence of Congressional legislation or mutual legislation of the two States, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case." (Italics ours.)

In *Randolph v. St. Joseph Gas Co.* (250 S. W. 642, 1. c. 645). The Company turned off the supply of gas for the non-payment of a controverted bill. The consumer sued for damages but was unable to prove very substantial damages. The Supreme Court of Missouri laid down the common law of that state as follows:

"But even without this proof, and in the light of the honest dispute over the correctness of the bill presented, it must be held that plaintiff's legal rights were invaded by the shutting off of the gas under the circumstances, and this affords sufficient basis for a finding of damages. Under such state of facts, damage will be presumed. This rule is too well settled to require citation of authorities."

Defendant urges that the proper proceeding on the part of plaintiff would have been to have paid the bill as presented, and then to have sued for refundment of any excess paid, if any. *The law is to the contrary.* The right of the gas company to shut off the gas upon the nonpayment of a bill as presented is *not an absolute right*; and, where there is a bona fide dispute as to the amount, the act of shutting off the gas to enforce payment properly, may be considered *arbitrary and outside the company's rights.*" (Italics ours.)

In *State ex rel. v. Kinloch Telephone*, 93 Mo. Appeal 349, l. c. 363, 67 S. W. 684, where the Telephone Company cut off the service for the nonpayment of a controverted bill and a controversy arose, the court said that the Company "*cannot be judge in its own case and decide the dispute*" (l. c. 362). Also

"If in fact, fair service was rendered during the time in dispute, the company has a good case to collect the rent for that time (Webster Telephone case, 17 Neb. *supra*), but cannot arbitrarily cut off appellants from a hearing and force them to submit to its terms or do business without a telephone. The facts of cases wherein a company or individual, bound to serve the entire community, seeks to withdraw service from some customer on account of defaulted payments, or other omission to comply with his contract, must be attended to, and if it is apparent that no good cause exists for the withdrawal and that the defendant will not be harmed by compelling it to continue to supply the customer, it should be compelled; otherwise the remedy of mandamus, which all the authorities agree may be invoked in such cases, will prove useless."

In *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, the court held:

"Where a telegraph company maintained a telegraph station for a number of years at an average deficit of \$134.33 per annum it should have applied to the public utilities commission to discontinue it, and it was unlawful to close the station and quit business thereat until such permission was granted." (Syl. 3.)

Other cases holding that a public utility cannot shut off and discontinue public service for the nonpayment of a disputed or controverted bill and that injunction is the proper remedy to prevent such action are as follows:

Dodd v. City of Atlanta, 113 S. E. 166; 154 Ga. 33.

Poole v. Paris Mountain Water Co., 62 S. E. 874; 81 So. Car. 438.

Birmingham Waterworks Co. v. Davis, 77 So. 927; 16 Ala. App. 333.

Sims v. Alabama Water Co., 87 So. 688; 205 Ala. 378.

Borough of Washington v. Washington Water Co., 62 Atl. 390, 70 N. J. Eq. 254.

Foster v. Monroe, 82 N. Y. S. 653; 40 Misc. Rep. 449.

Hatch v. Consumers Co., 17 Idaho 204; 104 Pac. 670; affirmed 224 U. S. 148.

The conclusion on this head is that the trial court should have granted the injunction prayed and left the supply company to its action at law, to prove the reasonableness of its charge.

POINT IX.

If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; and second, at rates agreed upon.

This vast investment of many millions of dollars in supply pipe lines and distribution properties and more millions in consumers' appliances, and this enormous business of many millions of dollars annually, is not a mere accident. It was planned, designed and constructed on a business basis, and the undertakings, rights and liabilities of the respective parties are fixed and measured by contracts.

While it may be admitted that the contracting parties were presumed to know that *rates* were subject to state regulation, and that therefore said rates, prescribed in said contract, are now superseded by the passage of the Public Service Commission Acts and the subsequent orders of the Commissions; the balance of the contracts and the essential relations they established still exist—the gas is still furnished.

That contract provides that the Supply Company shall furnish gas to the Kansas City Gas Company for the term of a certain ordinance, thirty years from September 27, 1906 (Rec. 49, 61), or any renewal or extension of such ordinance, or

practically in perpetuity (Rec. 41). That contract provides that said Supply Company shall furnish the distributing companies "natural gas in such amount as will at all times fully supply the demand for all purposes of consumption, as provided in this contract" (Rec. 41). "So long as the party of the first part is able to supply the same, the parties of the second part agree to buy from the party of the first part all the gas they may need to fully supply the demand for domestic consumption in said city" (Rec. 42).

The ordinance which fixes the tenure of that contract and is referred to therein and attached thereto as Exhibit 1, provides (Rec. 55, Sec. 14):

"Should the supply of natural gas, obtainable by grantees reasonably accessible, be, at any time hereafter during the life of this ordinance, inadequate to warrant them in continuing to supply natural gas under the terms of this ordinance, or should the Common Council of Kansas City so find at any time (and in the event of a disagreement as to the facts in this respect either party or a gas consumer may have recourse to the courts to establish the facts), they shall not be longer required to do so, but shall manufacture and furnish manufactured gas to said city and its inhabitants through said mains and pipes under the provisions of this ordinance as far as applicable. * * * The grantees shall not discontinue furnishing natural gas without serving at least six months' written notice upon the mayor of Kansas City of their intention so to do."

Even the final opinion of the court in the case of *Landon v. Commission et al.*, 269 Fed. 423, does not vacate and set aside said contracts in their entirety, but merely holds that (p. 432):

"The conclusion, therefore, is that the obligations of the Kansas Natural Gas Company under said supply contracts have been discharged and terminated by reason of the failure of gas, as provided for in said supply contracts. This conclusion applies to all of the contracts in controversy excepting No. 28.

The consideration running to the Kansas Natural Gas Company in the supply contracts was dependent upon the rates to be charged to the ultimate consumers. Those rates were therefore a primary inducing cause to the making of the supply contracts, and a nullification of the rates fixed for the ultimate consumer would necessarily affect the obligation of the supply contracts. In some instances these rates for the ultimate consumer were fixed by franchise ordinances, which were claimed to be contracts between the distributing companies and the cities which they served. So far as such contract rates were attempted to be made by cities of the first class in Kansas, they were *ultra vires* and void. *State ex rel. v. Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639, *Id.*, 231 U. S. 622, 34 Sup. Ct. 226, 58 L. Ed. 404. These decisions affected unfavorably the supply contracts between the Kansas Natural Gas Company and distributing companies operating in cities of the first class in Kansas, and included Nos. 1, 6, 16, 19, 20, 27 and 32 in the above list.

Though cities of the second and third classes retained power to make contract ordinance rates, nevertheless, by Chapter 238, Laws of 1911, Kansas, all such powers in those cities were superseded by or made subordinate to the power lodged by said statute in the Public Utilities Commission of Kansas, and since transferred to the Court of Industrial Relations."

The decree upon this opinion merely recites that these contracts "are not binding upon the Receivers of the Kansas Natural Gas Company or upon the Kansas Natural Gas Company, and the defendants * * * are all permanently enjoined from enforcing the aforesaid supply-contracts or *rates fixed or referred to therein* against plaintiffs, Kansas Natural Gas Company or said distributing companies" (Rec. 80).

In conformity with the foregoing opinion and decree, which clearly dealt only with rates, the Supply Company has continued to furnish, supply and sell gas to the distributing companies, and the latter have continued to purchase, receive, distribute and sell the same to their customers to this very hour, and will continue so to do for years to come.

The reasonable construction of the foregoing decision, therefore, is that the parties making said contracts were presumed to know that the rates fixed or agreed to therein were subject to regulation by state authority; that when the states exercised such power, the rates prescribed by the states superseded those named in the ordinances and supply-contracts. The two parts of the contract were "distributive" and could stand apart. *Freeport Water Co. v. Freeport City*, 180 U. S. 587.

There is nothing in the facts or record, the contracts or the opinions and decrees to justify the conclusion that the remaining and vital provisions of the supply-contracts, to furnish and supply natural gas, do not yet obtain; or that natural gas may be shut off and discontinued without reasonable notice, at least the notice stipulated in the contract.

In *Salisbury & S. Ry. Co. v. Southern Power Co.*, 102 S. E. 625, 626; P. U. R. 1920 D, 560, 564, when a power company tried to discontinue service under similar circumstances, the court said:

"The citizens of Salisbury, Spencer and adjacent territory have a very vital interest in this controversy.

The defendant does not undertake to furnish them electricity except through the medium of a distributing company. If defendant *cannot* be compelled to so continue to furnish it then these citizens have no other resource except to pay the higher cost of coal-made current, and the defendant is practically free from state control. Therefore they have a direct public interest in imposing upon defendant the duty it voluntarily assumed ten years ago and has been discharging ever since."

On the question of price under this head we submit that when the Supply Company on July 14, 1919, promulgated, published and mailed to the Kansas City Gas Company and other distributing companies its "Schedule of Rates for the Sale of Gas" (Rec. 70) and named therein the price of 35 cents per thousand feet; and the Kansas City Gas Company and other distributing companies, relying upon said offer to furnish and sell said gas at such price, applied to the Public Service Commission (Rec. 82) and procured an order from said Commission (Rec. 87) approving said 35-cent city gates price for said Supply Company (Rec. 88) and a schedule of selling rates bottomed upon such city gates price for itself (Rec. 87); and said Kansas City Gas Company did thereupon pay said 35 cents per thousand feet, and has continuously thereafter so paid the same (Rec. 101), and is willing, ready and able to continue so to do, *a contract arises*, not only implied but expressed, to continue to furnish said gas at said price until changed by agreement or, failing in such agreement, until such reasonable time after notice to enable said Kansas City Gas Company to make other provision for a supply of gas to meet the demands of its customers.

It follows from the foregoing that both an express and an implied contract exists obligating said Supply Company to furnish gas to the Kansas City Gas Company and other distributing companies until relieved from such obligation by agreement or upon proper notice as provided in said ordinance attached to said contract (Rec. 56), or such other reasonable notice as the equities of the case would require.

Upon this ground alone the trial court below should have enjoined the Supply Company from shutting off the supply of gas to Kansas City and its people, with its resultant, inestimable damage and loss to the public, leaving the question of price to be determined in an action at law.

The Kansas Case No. 133.

This court will take judicial notice of the Kansas Case, reported 111 Kans. 808, 208 Pac. 622, in which it appears that the Wyandotte County Gas Company is an intervener and party to that suit; that said company is entitled to the benefits of the judgment, decree and writ of mandamus issued in that case, and its rights under said decree cannot be defeated without a review of the judgment of said court in its favor. Yet the plaintiff in error, the Supply Company herein, has not sued out a writ of error as to said Wyandotte County Gas Company, and has not brought up the record to this court contained in the intervening petition and exhibits thereto and the Supply Company's answer. This court cannot say from the partial record in that case brought here whether or not the judgment of the Supreme Court of Kansas is correct.

Wherefore, said appeal should be dismissed.

Conclusion.

It follows from the foregoing that public policy requires the regulation of the Kansas Natural Gas Company; that the state has so provided for such regulation; that interstate commerce in natural gas is local in its nature, peculiarly of local concern, makes provision for local needs and pertains to a local public service; that non-action by Congress relating to such local commerce implies the needed regulation by the states; that the Supply Company shipping interstate gas locally sold, delivered and furnished to a public utility, consents to rate regulation by the states; that the Landon Case (249 U. S. 236) turned on the fact that the Receiver's rates were contractual—consent rates; that the challenged rates were for distributing companies, and that he had no cause of action; that the Supply Company may not arbitrarily discontinue the supply of gas to the Kansas City Gas Company without notice and without giving it an opportunity to make provision for supplying said city with other fuel; and that said Supply Company is now under contract to continue furnishing natural gas to said Kansas City Gas Company at reasonable rates fixed by the State Commission.

Wherefore, this case should be remanded with direction to issue a decree enjoining the Kansas Natural Gas Company from shutting off and discontinuing the supply of natural gas to the Kansas City Gas Company serving Kansas City, Missouri, and its inhabitants, and to other distributing companies furnishing gas in numerous cities, towns and villages in the State of Missouri.

Respectfully submitted,

L. H. BREWER,

FRANK E. ATWOOD,

*Solicitors for State of Missouri
and Public Service Commis-
sion of Missouri.*

Jefferson City, Mo.

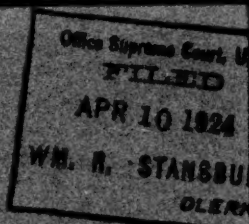
J. W. DANA,

*Solicitor for Kansas City Gas
Company.*

910 Grand Ave., Kansas City, Mo.

March, 1924.

No. 155.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1923.

STATE OF MISSOURI ON THE RELATION OF
JESSE W. BARRETT, ATTORNEY-GEN-
ERAL, PUBLIC SERVICE COMMISSION OF
MISSOURI, AND KANSAS CITY GAS COM-
PANY, APPELLANTS,

VS.

KANSAS NATURAL GAS COMPANY,
APPELLEE.

Filed November 20, 1922.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIVISION OF THE
WESTERN DISTRICT OF MISSOURI.
ARBA S. VAN VALKENBURGH, JUDGE.

BRIEF FOR APPELLEE.

HERBERT O. CASTER,
Bartlesville, Okla.,

ROBERT D. GARVER,
Bartlesville, Okla.,

RICHARD J. HIGGINS,
Kansas City, Kas.,

*Solicitors for Kansas Natural
Gas Company, Appellee.*

1. 11. 1907

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No. 155.

**IN THE
Supreme Court of the United States**

OCTOBER TERM, 1923.

STATE OF MISSOURI ON THE RELATION OF
JESSE W. BARRETT, ATTORNEY-GEN-
ERAL, PUBLIC SERVICE COMMISSION OF
MISSOURI, AND KANSAS CITY GAS COM-
PANY, APPELLANTS,

VS.

KANSAS NATURAL GAS COMPANY,
APPELLEE.

Filed November 20, 1922.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DIVISION OF THE
WESTERN DISTRICT OF MISSOURI.
ARBA S. VAN VALKENBURGH, JUDGE.

BRIEF AND ARGUMENT OF APPELLEE.

STATEMENT OF CASE.

This is an appeal by (a) State of Missouri on the
relation of Jesse W. Barrett, Attorney-General, and (b)

the Public Service Commission of Missouri, (complainants below) and (c) Kansas City Gas Company, (intervener below) from a final decree entered by the District Court of the United States for the Western Division of the Western District of Missouri, dismissing: (1) the bill of complaint filed by the complainants below against the Kansas Natural Gas Company, and (2) the intervening bill of Kansas City Gas Company. (Trans. 26-27.)

For brevity, State of Missouri is hereinafter referred to as "State;" Public Service Commission of Missouri is hereinafter referred to as "Commission;" Kansas City Gas Company is hereinafter referred to as "Kansas City Company;" and Kansas Natural Gas Company is hereinafter referred to as "Kansas Natural." The Public Service Commission Act of the State of Missouri is hereinafter referred to as the "Act."

Briefly stated, this is a case in which State and Commission as complainants in the court below sought an injunction to prevent Kansas Natural as defendant from increasing its rates for natural gas sold by Kansas Natural to various supply or distributing companies in the State of Missouri, unless and until the Kansas Natural had complied with the provisions of the Act. "This action is maintained for the purpose of requiring supply company (Kansas Natural) to file its rates with the Commission as provided by law." (Appellants' brief, 63.) This action was brought upon the theory, as stated in the bill, that Kansas Natural is a "gas corporation within the meaning of the Act," (Trans. 4),

and therefore subject to regulation thereunder as to rates charged by it. Kansas Natural in its answer denied that it was a "gas corporation within the meaning of the Act," (Trans. 11) and further averred that its business, to-wit: the transportation of gas from Oklahoma and Kansas to various points in Missouri where such gas was sold to distributing companies, was interstate commerce, and therefore such business was free from regulation as to rates by the State.

Kansas City Company intervened, and in its bill alleged that it purchases and receives gas from Kansas Natural at Kansas City, where it distributes such gas in accordance with the obligations of a franchise from the City of Kansas City. It adopted the allegations of the bill of complaint, and sought an injunction to restrain Kansas Natural from increasing the rates to it for the alleged reason that Kansas Natural was a "gas corporation within the meaning of the Act," and therefore Kansas Natural could only increase its rates in accordance with the provisions of the Act.

The statement of case as made by appellants in a general way fairly informs the Court as to the pleadings and evidence. A more detailed reference to certain portions of the pleadings and certain portions of the evidence will be made in our discussion of the legal propositions.

Upon final hearing, the court below ruled the case in favor of the defendant Kansas Natural, and refused the injunction prayed for and dismissed the bill of complaint and intervening bill of complaint.

The propositions in this case are:

First: Is Kansas Natural a "gas corporation" within the meaning of the Act? In the determination of this proposition, there are presented three inquiries:

- (a) Is Kansas Natural operating a "gas plant" within the meaning of the Act?
- (b) Is Kansas Natural operating a "gas plant" for "public use" within the meaning of the Act?
- (c) Is Kansas Natural operating a "gas plant" for "public use" pursuant to any privilege, license or franchise granted by the State of Missouri, or any political subdivision, county or municipality thereof, within the meaning of the Act?

Second: Is Kansas Natural (which is conceded by the pleadings to be engaged in interstate commerce) subject to regulation by the State and the Commission with respect to rates to be charged by it to distributing companies?

Appellee contends that all of the questions must be answered in the negative.

BRIEF OF ARGUMENT OF APPELLEE.

Kansas Natural is not a "gas corporation" operating a "gas plant" within the meaning of the Act, for the reason that it is not operating for "public use" nor distributing or selling gas for "light, heat or power."

The bill avers (Trans. 4) and the answer denies (Trans. 11) that Kansas Natural is a "gas corporation within the meaning of the Act." A "gas corporation within the meaning of the Act," is any corporation owning, operating or controlling any property used for or in connection with the distribution or furnishing of gas for light, heat or power, operating for public use, under privileges, licenses or franchises granted by the State or any political subdivision, county or municipality thereof. (Subdivisions 10 and 11, Section 10411, Revised Statutes Missouri 1919, see page ante).

Kansas Natural owns property in Missouri that it uses in connection with completing the transportation of natural gas from Kansas and Oklahoma (Trans. 39-40). The situation connected with the delivery of gas by the Kansas Natural is dealt with in the evidence only with respect to the delivery at Kansas City, Missouri, (Trans. 39-40) but in the case of the distributing companies at other cities, the situation is substantially the same. Kansas Natural does not furnish or distribute gas to its customer, the Kansas City Company for use by such customer for "light,

heat or power"; but from evidence introduced by complainants and intervenor, it appears that "*gas is furnished and delivered to meet the requirements of the Kansas City Company as governed by the requirements of its consumers from time to time.*" (Trans. 40.) By the franchise it is made the duty of Kansas City Company to distribute, sell and supply gas for private and public use in Kansas City, (Trans. 50), and for "illuminating, heating and mechanical purposes" (Trans. 55.)

The Act creates a public service commission. The Act defines with very elaborate particularity the various lines of business that come within the jurisdiction of the Commission, and with equal particularity the powers of the Commission with respect thereto. (Ante. p to))

In the bill, the State and the Commission have laid the foundation of the Commission's jurisdiction solely upon the claim that Kansas Natural is a "gas corporation within the meaning of the Act." (Trans. 4.) The answer denies that Kansas Natural is a "gas corporation within the meaning of the Act." (Trans. 11.) The term "gas corporation" is defined in the Act. (Subdivision 10 and 11 R. S. Mo. 1919, section 10411). Of course, under such a state of the record, unless it appears from the evidence that Kansas Natural is a "gas corporation within the meaning of the Act," (there being no other basis for the assertion of jurisdiction on the part of the Commission) the bill of complaint must, necessarily, be dismissed.

In order that a concern be a "gas corporation" it must operate a "gas plant"; it is true that the bill of complaint avers that Kansas Natural owns and operates a "natural gas plant and pipe line system" and the answer admits that the Kansas Natural operates a "natural gas plant and pipe line system," but the complaint did not aver, nor did the answer admit that the Kansas Natural owns and operates a "gas plant within the meaning of the Act." In connection with the allegation that Kansas Natural is a "gas corporation," it is averred that Kansas Natural is a "gas corporation within the meaning of the Act." This last averment was denied. Of course, Kansas Natural in a certain sense is operating a "gas plant"; it owns and uses pipes for the transportation of gas and sells and delivers gas to distributing companies, but we contend that the pleadings should be construed with reference to the allegation that Kansas Natural is operating a "gas plant," so as to admit of inquiry as to the character of gas plant that Kansas Natural is operating, and if it appears from the evidence that Kansas Natural is not operating a "gas plant within the meaning of the Act," then such conclusion should be drawn by the court, and full effect given thereto. A "gas plant" is defined by the "Act" as property used in connection with the distribution of gas (natural or manufactured) for light, heat or power. The evidence introduced by complainants and intervenor conclusively established that Kansas Natural is not distributing or furnishing gas for "light, heat or power," to any consumer that is affected by the increase in

rates announced by the Kansas Natural: (Trans. 9-39-40) that the distributing companies which are affected by the increase in rates are not using gas for light, heat or power, nor in fact, are they consumers of such gas for any purpose but such gas is purchased by them to meet the requirements of their customers, who are consumers. (See paragraph 12 of Stipulation, Trans. 40.) Therefore, it necessarily follows that the "gas plant" of Kansas Natural is not such a "gas plant" as is described in the "Act" for the reason that it is not used for the distribution of gas for light, heat or power.

It seems apparent that the Legislature of Missouri in defining the term "gas plant" intended to include within the definition only such "plants" as were used for the distribution of gas to "consumers." Natural gas is produced from wells, and in many cases these wells are owned by others than those distributing the gas therein produced to users or consumers. This the legislature knew, because natural gas was used in Missouri long before the passage of the "Act." In connection with all gas wells, the owner must maintain some pipes and connections at the well in order to deliver the gas to a customer, whether such customer be a consumer of the product or a merchant therein. It was intended by the "Act"—it is the underlying scheme of the "Act"—that transactions of individuals or corporations owning property used in the distribution of gas with those who are using gas for "light, heat or power" (in other words, consumers

of the product and not mere merchants in or distributors of gas) should be subject to Commission control. It clearly was not intended by the "Act" to go back of the person or corporation bound by a public obligation to furnish to the public gas for heat, light and power (i. e. a public utility) and regulate persons or corporations dealing with such public utility only as a supplier of natural gas to be used by the public utility in furnishing service to the public. If Kansas Natural which supplies gas to the Kansas City Company (a public utility and non-consumer—a merchant in gas) is subject to regulation because the Kansas City Company uses the gas purchased from Kansas Natural for the purpose of sale to the public for light, heat or power, then the owner of the gas well which furnished gas to the Kansas Natural is likewise subject to Commission regulation. It would seem to necessarily follow that the owner of the land upon which is located the gas well would also be subject to regulation as a public utility. This would be so, because the owner of the land upon which is located the gas well from which gas is sold to the Kansas Natural, is dealing with a product that is finally served to the public by others, but through agencies (of which he is one) in a direct sequence through him. If the State may control any one of these agencies, other than the one under the public obligation, then the State may control all. The theory of public utility regulation has never been carried that far, and if attempted, would give rise to serious constitutional questions. But even admitting that such character of regulation be

constitutionally sound, such theory could not be sustained in this case, because there is an absence of legislation to justify the theory.

In order to be a "gas corporation" within the meaning of the Act, there must be a "gas plant within the meaning of the Act," operated for "public use" under a privilege, license or franchise granted by the State, or some political subdivision or municipality thereof.

Kansas Natural is not operating its property for "public use." Its sales are to but one customer in each community. This customer is not a consumer, but a merchant in the product sold. The cases hereinafter cited and the quotations therefrom apply to two of the propositions presented in this case, to-wit: (1) Kansas Natural is not operating a "gas plant within the meaning of the Act." and (2) Kansas Natural is not operating its property for "public use."

In the case of *Nowata County Gas Co. v. Henry Oil Company*, 269 Fed. 742, the Circuit Court of Appeals for the Eighth Circuit held that a corporation furnishing gas to a public service corporation which in turn publicly distributed such gas in Nowata, Okla., was not subject to regulation by the Oklahoma commission. The court in its opinion says:

"Our attention has not been called to any decision by a court which holds that under the police power the state may create an administrative body or commission with authority to fix or establish prices to be paid by a public utility for things purchased and used by it or, as in this case.

for a commodity furnished by it to the public.
(Italics ours.)

"It is unnecessary to consider the question above suggested, as the law of the State of Oklahoma conferring jurisdiction on the Corporation Commission over public utilities does not attempt to confer such authority. The statute (Sec. 2, Chapter 93, Session Laws, 1913) reads as follows:

"The Commission shall have general supervision over all public utilities with power to fix and establish rates and to prescribe rules, requirements and regulations affecting their services, operation and the management and conduct of their business."

"Taken in connection with other provisions of the statute creating the commission and defining its powers, it seems clear that the legislature conferred, and only intended to confer authority to fix the rates to be charged by a public utility and to be paid by its patrons for the thing furnished or the services rendered by it to the public. (Italics ours.)

"The order of the commission fixing, or attempting to fix, the price to be paid by the plaintiff for gas thereafter to be supplied by the defendant to the plaintiff, and by it furnished to the public, cannot be upheld on the ground that the plaintiff was a public service corporation or public utility. If the order of the commission cannot be sustained upon some other ground, it is null and void and constitutes no defense to the suit of the plaintiff for damages for breach of the contract. (Italics ours.)

"The commission had authority to fix the rates to be paid by the plaintiff for gas furnished it by the defendant, notwithstanding the contract, if the defendant, the Henry Oil Company, in supplying gas to the plaintiff was acting in the capac-

ity of, or exercising the functions of, a public utility. The expression 'public utility' characterizes the business, rather than the owner of the business, and in order that a business shall be a public utility it must in some way be impressed with a public interest. One of the earliest and the leading case upon the subject is *Munn v. Illinois*, *supra*, in which it is said:

" 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.'

"In *Pinny & Boile Company v. Los Angeles, G. & E. Corporation*, *supra*, (168 Cal. 12, 141 Pac. 620, L. R. A. 1915-C 282, Ann. Cas. 1915-D, 471) it is said:

" 'It is the duty which the purveyor or producer has undertaken to perform on behalf of and so owes to the public generally, or to any defined portion of it, as the purveyor of a commodity, or as an agency in the performance of a service, which stamps the purveyor or the agency as being a public service utility.'

"In *State ex rel. M. O. Danciger & Co. v. Pub. Ser. Com. of Mo.*, 275 Mo. 496, 205 S. W. loc. cit. 40, the Supreme Court of the State of Missouri in discussing this question said:

" 'State regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly de-

pendent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated, and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then that law is obviously unconstitutional, because it takes private property for public use without compensation.'

"From the evidence it appears that the defendant is a corporation organized under the laws of South Dakota. It held leasehold interests in numerous parcels of land situated in the gas field above mentioned. In the development of these lands for natural gas it drilled altogether 45 wells. Between 1906 and 1916 it produced and disposed of large quantities of natural gas to seven customers, of which the plaintiff was one. The plaintiff, as already stated, was a public service corporation supplying gas to the people of the city of Nowata. The other customers of the defendant were industrial concerns, some of them perhaps public utilities, located at Bartlesville, a few miles west of the gas field. All of the gas produced by the defendant was disposed of by it to all of its customers, except one, at its wells in the gas field. The gas furnished by the defendant to one of its customers was delivered at Bartlesville through a pipe line owned and operated by another company, known as the Henry Gas Company. The fact that this pipe line was not owned or operated by the defendant company is of no great importance. It does not appear from the record that in the construction of the pipe line the owner exercised, or attempted to exercise, the right of eminent domain, or that it has any franchise in respect to said pipe line from the city of Bartlesville or other public municipality.

"During a large part of the time that the defendant was delivering gas to the plaintiff at the rate of 2 cents per 1,000 cubic feet, it was delivering gas to its other customers at rates ranging from 2½ cents to 5 cents per 1,000 cubic feet. Applying the principles of law announced in the foregoing cases to the facts in this case, we do not think the business in which the defendant was engaged constituted it a public utility, or that it is a public utility under the Constitution and acts of the Legislature of the State of Oklahoma creating and defining public service corporations or public utilities."

The Supreme Court of Missouri in the case of *State v. Public Service Commission*, 275 Mo. 496, 205 S. W. 36, (cited *supra* p. . . .) had occasion to construe and apply certain provisions of Section 10411, Revised Statutes of Missouri, 1919, which are very similar to the provisions of the same section which are under consideration in this case. The question presented in the case of *State v. Commission, supra*, was, has the Commission the power to regulate, as a public utility, a brewery corporation supplying electric energy within a three-block radius from the brewery when such brewery was operating in so furnishing such energy without a franchise? The regulation, of course, sought to be imposed dealt only with the sale of electrical energy. Following the definition of "gas plant" and "gas corporation" in Section 10411, Revised Statutes of Missouri, 1919, are found definitions of the terms "electric plant" and "electric corporation." The statutory definition of "electric plant" and "electric cor-

poration" omit all reference to "public use" of the plant. Notwithstanding such omission, the Supreme Court of Missouri held the words would be understood as being in the statute, and that an electric plant in order to be subject to regulation must be operated for "public use." The court in its opinion said there was in the case no explicit professing of public service or undertaking to furnish lights or power to the whole public, or even to all persons within the limited area of three blocks. The court pointed out that if the electric department of the brewery plant was a public utility, then under the provisions of the Act, the Commission could compel service to all residences and business houses, and for all purposes, at least within the limited area furnished. Also (there being absent the question of franchise) the Commission could require service to the entire town of Weston. In order however, to do either of these things, a franchise must be obtained but the Supreme Court in its opinion pointed out that it had expressly held in a similar case that any order which required a utility to obtain a franchise was beyond the power of the Commission. (*State ex. rel v. Commission*, 270 Mo. loc. cit. 442, 192 S. W. 958, 198 S. W. 872). Continuing, the Supreme Court said:

"In the light of these considerations, does the business of respondent constitute him a public utility within the meaning of the Public Service Commission Act? We are of opinion that it does not; for, as forecast above, state regulation of private property can be had only pursuant to the police power, which power is bottomed on and wholly

dependent upon the devotion of private property to a public use. If the requirement that the private property shall be devoted to a public use, before it can be regulated and before inquisitorial authority be exercised over it, is not to be read into the applicatory law, then the law is obviously unconstitutional, because it takes private property for public use without compensation."

What was said by the Supreme Court of Missouri in the above case, is, of course, fully and completely applicable to and decisive of the case at bar. Kansas Natural has no franchise, yet, if it is subject to Commission control, it may be required under the Act to furnish gas to the public generally. And, yet, this it cannot be required to do, because it would necessarily be required to obtain the consent of the city in order to use the city streets, and this neither the courts nor the Commission can compel. *State v. Commission*, 270 Mo., loc. cit. 442. The considerations which led the Supreme Court of Missouri to conclude that the electric business of the brewery was not subject to regulation under the "Act," are all present in the case at bar. There is the same absence of franchise and public profession. But in one particular, the case at bar is even stronger as against control. Kansas Natural does not distribute gas to consumers, which the electric plant did.

The Supreme Court of Missouri in the case of *State v. Commission*, 275 Mo. 496, *supra*, also said:

"The rule by which profession of public employment is to be tested, where, as here, such profession arises if at all implicitly, is thus laid down by Mr. Wyman: (Italics ours.)

"The fundamental characteristic of a public calling is indiscriminate dealing with the general public. As Baron Alderson said in the leading case: 'Everybody who undertakes to carry for any one who asks him is a common carrier. The criterion is whether he carries for particular persons only, or whether he carries for everyone. If a man holds himself out to do it for every one who asks him, he is a common carrier, but if he does not do it for everyone, but carries for you and me only, that is a matter of special contract.' This regular course of public service without respect of persons makes out a plain case of public profession by reason of the inevitable inference which the general public will put upon it. 'One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier.' 1 Wyman on Pub. Service Corps., 227." (Italics ours.)

Clearly under the above decision, Kansas Natural is not engaged in a public employment. Its business is with but one customer in each community. It does not deal with all. It does not appear that it has the facilities to deal with the public, and it does appear that it is without authority to deal with the public in this: That it is without a franchise to distribute gas to the public. Kansas Natural deals with only such distributing companies as it elects to deal with. Throughout all of Western Missouri, where there is located many towns of substantial size, it deals with gas distributing companies in but the few places mentioned in the bill. It could not be required to extend its service to distributing companies in other cities. Its relations with distributing

companies are contractual and private, and do not arise out of the exercise of public relations or profession.

Another very interesting feature of the foregoing case (275 Mo. 496) is the reference therein to the case of *State ex rel. v. Spokane, etc., Railroad Co.*, 89 Wash. 599, 140 Pac. 591. With respect to the Washington case, the Supreme Court of Missouri said:

"The case of *State ex rel v. Spokane, etc. Railroad Co.*, *supra*, which was decided by the Supreme Court of Washington, is practically on all fours with the case at bar upon the ultimate facts. Not only is this true, but the definitions in our own Public Service Commission Act (and largely the act itself) were obviously taken, with mere slight verbal changes, from the prior Washington enactment on the same subject. Laws Wash. 1911, pp. 538-612."

In the case of *State ex rel v. Spokane Railroad Company*, *supra*, the Washington Commission instituted mandamus to compel the defendant railroad company to disclose and file with the Commission its contracts for the sale of electric energy to various customers. The defendant was a street railroad company. It was producing and purchasing more than sufficient electrical energy to take care of its street railway business. By contract, the street railway company had sold its surplus current to various persons, including a land company, one or two farmers who used the power for irrigating purposes, two manufacturing plants, one grain elevator, one irrigation company, and three or four individual owners of local electric light plants in towns and villages in the vicinity of Spokane. That defend-

ant with respect to its street railway business was subject to the control of the Commission was not challenged. In fact, the action by the Commission was based upon the claim that the Commission could not make an adequate and intelligent survey of the rates charged for street railway service without having knowledge of the contracts and activities of defendant in connection with the sale of power.

The Supreme Court of Washington in its opinion says that the Act of 1911 assumes jurisdiction over power companies and electric companies, but the court finds nothing that compels the conclusion that the legislature intended to inquire into and regulate such companies, except in so far as their business affects the right of the whole public to the use of their products upon fair or reasonable terms. The court further said:

"Granting for the sake of argument that the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that the business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Am. Cas. 1912-A, 487; and *German Alliance Company v. Kansas*, 233 U. S. 389,

34 Sup. Ct. 612, 58 L. Ed. 111, L. R. A. 1915-C, 1189, rest.

"Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power but primarily, the assertion of police power is for the legislature. They are not disposed to hold that a thing should be done by an individual or by the whole public. They have acted only after the legislature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether the legislative act has been reasonably within the legislative power, and the thing sought to be done is fairly within the terms of the act. And it is well that this is so, for the legislative body can extend the demand of police power with sufficient rapidity. There is no reason why the court should engage in a rivalry with it. (Italics ours.)

* * * *

"At the time the act of 1911 was passed, the law was well defined and certain in its terms. The sale of power to individuals or companies to be in turn sold was not a public use. The rule and the cases declaring it must have been well-understood by the legislature. Yet, the act nowhere attempts to cover any use theretofore deemed to be private. Its whole context seems to compel the thought that it had in mind only such use as the public might compel." (Italics ours.)

The court, therefore, concluded (notwithstanding the fact that the street railroad company was clearly subject to the control of the Commission in its ordinary street railway activities) that it was not subject to con-

trol with respect to its contracts for the sale of electrical energy, even though among such contracts were three or four with electric light plants in towns and villages. This conclusion necessarily followed, because "the sale of power to individuals or companies to be in turn sold is not a sale for a public use," and defendant had not assumed the duty of (either by franchise or conduct) to furnish energy to the public.

In our judgment, the Washington case can in no sense be distinguished from the case at bar. It is true that in the Washington case the electrical energy sold was energy not then needed for the operation of the street railway; but the private as distinguished from the public character of the business is the principle that controlled the court's decision. That is to say, the business being done by the street railway company with respect to the sale of power to individuals and to public utilities companies who used the power for sale to the public, was held to be not a sale for public use.

It is not averred in the bill that because of the sale of gas to a few main-line consumers or to consumers in the Joplin, Missouri, mining district, that all of the business of Kansas Natural (including its sales to distributing companies) is thereby subject to regulation by the Commission. No doubt, complainants had in mind at the time they prepared their bill the provisions of subdivision 13 of Section 10478, Revised Statutes Missouri, 1919, (*supra* . . .), in which it is expressly provided that in case any gas corporation is engaged in other business, that is not subject to the jurisdiction of the

Commission, and its business is so conducted that the two parts thereof are substantially kept separate and apart, such gas corporation shall not be subject to any of the regulations provided by the Act with respect to such other business. The above subsection also disposes of any contention that might be made that because the charter of Kansas Natural might be construed to be broad enough to authorize such company to engage in the public distribution of gas, it is therefore, subject to regulation, regardless of its exercising its full charter powers.

Kansas Natural is not a "gas corporation" operating a "gas plant" for the reason that it is not operating under any privilege, license or franchise granted by the State of Missouri or by any political subdivision, county or municipality thereof.

It will be noted from the statutory definition of the terms "gas plant" and "gas corporation" Subdivision 10 and 11 Section 10411 Revised Statutes Missouri 1919, *supra* that a business in order to be subject to regulation by the Missouri Public Service Commission as a "gas corporation" must be one wherein there is a "gas plant" used in connection with the distribution, sale or furnishing of gas for light, heat or power; that it must be operated for public use, and under a privilege, license or franchise granted by the State or some political subdivision, county or municipality thereof.

We have hereinbefore argued the propositions: (1) Kansas Natural is not with respect to the business complained of, distributing gas for light, heat or power;

and (2) Kansas Natural is not with respect to the business complained of operating for public use.

But we contend that it also appears that Kansas Natural is not operating under a privilege, license or franchise granted by the State or by any political subdivision, county or municipality thereof. The words "privilege, license and franchise" often have of course very broad meanings but in view of the context, it seems no great difficulty should be found in determining the meaning intended in this particular case. Section 8390, R. S. Mo., 1919, defines the term "franchise" as used in the article dealing with municipal corporations, as including "every special privilege in the streets, highways and public places in the city, whether granted by the state or the city, which does not belong to the citizens generally by common right." This, we think, is the definition of the term as it was intended in the "act." The word "license" was intended to be used synonymously with the word "franchise." In other words, it comprehends a license to use the "public streets." It is contended by complainants and intervenor that "privilege" is a somewhat broader term, and includes every right including, eminent domain, granted by law to a corporation. This construction, however, we deny. The words "privilege, license and franchise" are used in a "public utility act." The terms, "privilege, license and franchise" are intended to include the "privileges, licenses and franchises" that public utilities, as such, ordinarily or commonly enjoy from state or municipal authority in order that they may conduct the lo-

cal business of a public utility. The existence of a franchise or license is a question of fact. The existence of a privilege (if privilege includes eminent domain) is a question of law. There is in the record an entire absence of evidence tending to establish that Kansas Natural is the possessor of a franchise, license or privilege granted by the State of Missouri or by any city or county in the State of Missouri, or by any political subdivision thereof. There is in the record evidence offered by State and Commission to the effect that Kansas Natural does not have from Kansas City, Missouri, any franchise to use the public streets of said city.

It was averred in the bill that Kansas Natural through its predecessors became obligated to the various cities in Missouri by virtue of the so-called supply contracts with local distributing companies. All of said contracts were, on December 24, 1920, decreed to be no longer of any binding force or effect, and complainants and intervener enjoined from enforcing the same. (Trans. 73.)

It was also averred in the bill that the predecessors of Kansas Natural had entered into an arrangement with Kansas City, Missouri, as provided in Section 20 of the Kansas City, Missouri, franchise. (Trans. 4-5.)

Section 20 of the Kansas City, Missouri, franchise required the predecessors of the Kansas City Company to procure an agreement from the predecessors of Kansas Natural and file the same with the City Clerk of Kansas City, Missouri, under the terms of which agreement the predecessors of Kansas Natural would agree

that if the City of Kansas City, Missouri, should acquire the plant of the Kansas City Gas Company, the predecessors of Kansas Natural would, upon demand, carry out the supply contracts between the predecessors of the Kansas City Company and the predecessors of the Kansas Natural. Kansas City has not acquired the property of the Kansas City Company, so the contract or agreement is not operative; but it also appears from the evidence that the supply contracts between the predecessors of the Kansas City Company and the predecessors of Kansas Natural were by order of the United States District Court, entered on December 24, 1920, held to be no longer operative or binding upon Kansas Natural; and by the said order of December 24, 1920, the Attorney-General of Missouri, the Public Service Commission of Missouri, and the Kansas City Gas Company "were permanently enjoined from enforcing the said supply contracts or rates fixed or referred to therein against plaintiffs or the Kansas Natural Gas Company, and its successors and assigns." (Trans. 80.) Furthermore, it appears from the same order that "the City of Kansas City, Missouri, having in open court expressly disclaimed any intent of enforcing or attempting to enforce the supply contracts or either of them relating to Kansas City, Missouri, no injunction will run against said city in respect to said contracts." (Trans. 80.)

Appellant, the Kansas City Company, by its intervening bill avers that Kansas Natural has been vested by law with the power of eminent domain. Even assuming that Kansas Natural is vested with the power

of eminent domain, one certainly must pause before agreeing with the contention of appellants that thereby Kansas Natural is subject to regulation by the State with respect to the rates that Kansas Natural may charge for the transportation of gas in interstate commerce.

A state may regulate any purely local business that is conducted in accordance with a grant from the State. In the Jamestown case, for example, the power to regulate the rates of the gas company was sustained because the gas company was engaged in operating under a franchise granted by the State authority; but it indeed would be revolutionary if it could be successfully contended that an interstate transportation company was subject to local regulation as to rates for interstate transportation because the state had granted the right of eminent domain to such transportation company.

In all of the States, and with respect to many branches of interstate transportation to some extent at least, the power of eminent domain is granted to companies. Oklahoma sought to restrain interstate commerce by denying to gas companies the right to exercise the power of eminent domain when the proposed transportation in gas was interstate rather than intrastate. This court in the case of *West v. Kansas Natural*, *ante*, declared that such control of interstate commerce was an attempt to exercise authority in excess of that authorized by the Constitution of the United States.

Clearly, the incident that Kansas Natural might be empowered to exercise the power of eminent domain under the laws of Missouri (if it be so empowered) could not vest the state of Missouri with the power to directly regulate interstate transportation conducted by Kansas Natural by fixing and prescribing the rates to be charged for such transportation. Under such a principle every interstate railroad company would be subject to State regulation as to rates. There is no such direct connection between the granting of the power of eminent domain and the fixing of rates for transportation that it could be said that the exercise of the power necessarily involved the right of the State to control the rates. Furthermore, Kansas Natural has never exercised the power of eminent domain. The bill avers such exercise (Trans 18), but the answer denied it (Trans. 23), and there is no proof bearing upon the point. But there is another and very serious question presented in this case with respect to the power of eminent domain. We contend that Kansas Natural is not empowered under the laws of Missouri, nor can it be empowered under the Constitution of Missouri, with the right to exercise the power of eminent domain. Sections 20 and 21 of Article II of the Constitution of Missouri provide as follows:

"Private property not to be taken for private use—exceptions—public use a judicial question. That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches

across the land of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

"Private property for public use—compensation—That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracts without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken."

From the foregoing sections of the Constitution, it is established that property may be taken by eminent domain only for public use. We think it has been satisfactorily established herein that the business being transacted by Kansas Natural is not a business that is operated for public use, and therefore the Constitution of Missouri constitutes a very effective barrier against the exercise of the power of eminent domain by Kansas Natural.

But, there is one other question that is likewise presented in this case with respect to this particular matter, and that is the statutory power of Kansas Natural to exercise eminent domain.

The only section of the Missouri statutes that is applicable to corporations such as Kansas Natural, dealing with the subject of condemnation is Section 1791, Revised Statutes of Missouri, as amended by the laws of Missouri, 1921, page 128, which section, in so far as it is applicable, is as follows:

"In case land or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electric corporation organized for the manufacturing or transmission of electric current for light, heat or power, or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground, or other corporation, created under the laws of this State for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid * * * such corporation may apply to the Circuit Court of the county in this State in which such land or any part thereof lies or the judge thereof in vacation by petition, setting forth the general directions in which it is desired to construct their * * * pipe line or gas line, over or underneath the surface of such lands * * * praying the appointment of three disinterested freeholders as commissioners, or a jury to assess the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such pipe lines or gas lines, over and underneath the surface of such lands; to which petition the owners of any or all as plaintiff may elect * * * may be made parties. * * *."

It will be noted that Section 1791 by its express terms, extends the right of eminent domain only to corporations created for public use, and it seems to us

from a careful consideration of the statute and such decisions as are applicable thereto that it is the intention of the Missouri Legislature to limit the power of condemnation to domestic corporations. Kansas Natural is a corporation created under the laws of Delaware (Trans. 3) and therefore, the statute would not be applicable to it.

Section 1791 is first found in the laws of Missouri as Section 1——, Chapter 66, Revised Statutes of Missouri 1865. At that time, telephone companies, gas companies, and oil companies were apparently unknown to the law, and for that reason, the power of eminent domain was limited to a much smaller class of corporations than that now included in the law. The original enactment read, in so far as here applicable, as follows:

Revised Statutes of Missouri 1865:

"In case lands sought to be appropriated by any road, railroad or telegraph corporation created under the laws of this state belong to private persons, and such corporation and the owners cannot agree upon the proper compensation to be paid.
* * *"

In the Revised Statutes of Missouri, 1879, the foregoing Act is found as section 892. The changes apparently were made by the revisors. The law was changed by including the words "or other property" after the words "land" and by including the word "telephone" before "telegraph," so that the act reads:

"In case lands or other property are sought to be appropriated by any road, railroad, telephone, telegraph or other corporation created under the laws of this state for public use, and such corporation and the owners cannot agree upon the proper compensation to be paid, etc."

The above statute remained in the above form until 1915, when it was amended by the laws of Missouri, 1915, page 227, by inserting after the word "telegraph," the following words: "or any electrical corporation organized for the manufacture or transmission of electric current for light, heat or power." The amendatory act also changed the word "lands" as it occurred in the Revised Statutes of 1879 to "land," so that after the amendment in 1915, the act read:

"In case land or other property is sought to be appropriated by any road, railroad, telephone, telegraph or any electric corporation organized for the manufacture or transmission of electric current for light, heat or power, or other corporation created under the laws of this state for public use, etc."

In 1919 the act was again amended by the laws of Missouri, 1919, page 207, by inserting after the word "power," the following words: "or any oil, pipe line or gas corporation engaged in the business of transporting or carrying oil or gas by means of pipes or pipe lines laid underneath the surface of the ground." So that the act when amended by the laws of 1919, reads as hereinbefore quoted as section 1791, Revised Statutes of Missouri, 1919.

The changes in the statutes made from time to time have undoubtedly been made in order that the laws of the State of Missouri might progress in line with the growth of public business. The law has been amended so as to extend the right of eminent domain to corporations created for other public purposes than those originally specified.

As originally written, there could have been no doubt that the statute restricted the right of eminent domain to domestic corporations. In the light of the historical development of the statute itself, it seems that no doubt as to that intent can now be had.

We recognize that the Supreme Court of Missouri in the case of *Gray v. Railway Company*, 81 Mo. 126, l. c. 136, held that a foreign railroad corporation might condemn land for railroad purposes, but an examination of that case discloses that the right of a foreign corporation to condemn land was not based upon the powers given by section 1791 but upon other sections of the Missouri laws that deal directly and exclusively with the condemnation of lands for railroad purposes, and it was from these statutes that the Supreme Court of Missouri found authority in foreign corporations to condemn land. The laws of Missouri, 1870, page 90, provide that any railroad company duly incorporated and existing under the laws of an adjoining state of the United States may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all of the rights, powers and privileges conferred by the general laws of

this state upon railroad corporations organized thereunder, and shall be subject to all of the duties, liabilities and provisions of the laws of this state, concerning railroad corporations as fully as if incorporated in this state.

We also recognize that in the case of *Southern Company v. Stone*, 174 Mo. 1, l. c. 33, the Supreme Court of Missouri held that foreign bridge companies might condemn lands for approaches to bridges, but in the case of a bridge company, the right was also founded upon a special statute which dealt exclusively with the condemnation of lands for bridge purposes. The right to exercise the power did not arise out of section 1791, although the procedure did.

The very fact that at the time of the decision of the cases of *Gray v. Railroad Company* and *Southern Company v. Stone*, section 1791, Revised Statutes of Missouri, 1919 (in earlier form) was found in the laws of Missouri, and that the Supreme Court in both cases failed to judicially notice and apply the statute, but on the contrary, sought other statutes as authority for the exercise of the power, is very highly persuasive that the court would have denied the existence of the power had it depended upon the general statute.

In *Chestatee Pyrites Company v. Cavenders Creek Gold Mining Company*, 119 Ga. 354, 46 S. E. 422, the Supreme Court of Georgia denied to a foreign corporation the right to condemn land under the statutes of Georgia, notwithstanding the fact that such statutes extended the power to "any corporation."

The Supreme Court of Georgia quotes with approval from Thomson on Corporations, Volume VI, paragraph 7932, as follows:

"The power of a private corporation to acquire private property for a public purpose is a power which comes to it alone through the delegation by the State of its sovereign right of eminent domain. The power cannot, therefore, be exercised by a foreign corporation on a mere principle of comity, because it will never be presumed in the absence of affirmative legislation that the state delegates any part of its sovereignty to a foreign corporation. It may be stated with confidence in every case that this power cannot be exercised by a corporation created under the laws of one state or country within the limits of another state or country, without the consent of the legislature of that other state or country affirmatively expressed."

There is no case in the Supreme Court of Missouri that we have been able to find in which a foreign corporation has asserted the right to exercise eminent domain under the provisions of Section 1791. In fact the only cases in which the right of foreign corporations to exercise the power has been brought in question are the railroad and bridge cases, *supra*, and in these cases, it was held that under the particular statutes relating to foreign railroad companies and foreign bridge companies, respectively, the right to exercise the power was given.

The case of *Cape Girardeau and Scott County Macadamized Road Company v. Dennis*, 67 Mo. 438, l. c. 441, is very interesting, because of the construction placed upon the Act by the Supreme Court of

Missouri. In the above case, the contention was made that the corporation seeking to exercise the power should be denied the right, because it was created by special act and not by general law. The Supreme Court denied the validity of such objection, saying, in part:

"Section 1. Chapter 66 of the General Statutes provides that when land sought to be appropriated by any road, railroad or telegraph company created under the laws of this State, belongs to private persons, and such corporation and the owners cannot agree upon the proper compensation to be paid, such corporation may institute proceedings in the circuit court to condemn such lands for the use of the company. *The language of the section is general. It includes all road, railroad and telegraph corporations created under the laws of this state.*" (Italics ours.)

The act referred to *supra* is the act in this case, except only that the act has been enlarged so as to include other corporations.

The sole question presented under this point is one of course of statutory construction. The statute appears to us to be so plain in its limitations as to not admit of controversy. The right to exercise eminent domain is limited to gas corporations created under the laws of Missouri, and the Kansas Natural, being a corporation of Delaware, is without the power, and therefore enjoys no privilege under the laws of Missouri.

We, therefore, conclude: "Kansas Natural is not a gas corporation within the meaning of the Act," because: (1) Kansas Natural is not selling or furnishing gas for light, heat or power; (2) Kansas Natural

is not selling gas for public use; (3) Kansas Natural is not operating its business for public use; (4) Kansas Natural does not exercise or enjoy a franchise, license or privilege from the State of Missouri or any county, city, municipality or other political subdivision thereof. Therefore, neither State nor Commission may require Kansas Natural to comply with the provisions of the Act before increasing its rates for natural gas.

The business of Kansas Natural that is herein sought to be regulated by the State through the Commission is interstate commerce.

Kansas Natural in the transportation of gas from Oklahoma, through Kansas, into Missouri, is engaged in interstate commerce. That the business of Kansas Natural is interstate commerce has been expressly decided by this court. *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564; *Haskell v. Kansas Natural Gas Co.*, 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442; *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, P. U. R. 1916-C-834, 39 Sup. Ct. Rep. 268. As a matter of fact, the bill of complaint avers that Kansas Natural is engaged in interstate commerce with respect to the very matters that are sought to be controlled. (Trans. 7.) The evidence introduced by complainants establishes that Kansas Natural produces or purchases gas which it then transports from points in the State of Oklahoma and Kansas to points in the States of Kansas and Missouri; that all of said gas is transported to the States of Kansas and

Missouri, where such gas is sold and delivered to local distributing companies in some thirty towns and villages in the States of Kansas and Missouri; that in connection with the delivery of gas at Kansas City to the Kansas City Company, Kansas Natural maintains permanent physical connections within the State of Missouri between its pipe line system and the plant and street main system of the Kansas City Company; that said connections between the Kansas City Company and Kansas Natural are located at or near the state line of Kansas and Missouri; that Kansas Natural, for the purpose of making such connections, has its pipes for a short distance upon the public streets of Kansas City, Missouri, but that Kansas Natural has no franchise granted by Kansas City, Missouri, authorizing it to occupy the streets, alleys or public places upon or along which to lay, maintain or operate its pipe lines; that no advance orders are given by Kansas City Company to Kansas Natural for the shipment of any definite quantity of gas, but gas is furnished and delivered continuously by Kansas Natural, to meet the requirements of the Kansas City Company as governed by the requirements of its consumers from time to time; that no joint-ownership or intercorporate ownership or relation exists between Kansas Natural and Kansas City Company or any other local distributing company.

In view of (1) the prior adjudication, (2) the allegations of the bill, and (3) the evidence introduced in the case, we take it that it is established that Kansas

Natural is engaged in interstate commerce with respect to the particular class of business that is here sought to be regulated.

Kansas Natural is not subject to regulation by the Commission as to the rates to be charged by it to local gas distributing companies in the State of Missouri because the business being conducted by Kansas Natural is inter-state commerce.

Appellants, State and Commission, while averring in their bill that the business of Kansas Natural, to-wit: the transportation of gas from Oklahoma to Missouri is interstate commerce, nevertheless, aver that the Commission may directly regulate such interstate commerce because it is "interstate commerce of a local nature." (Trans. 7.)

There is in so far as the Constitution of the United States is concerned no "interstate commerce of a local nature." To so describe interstate commerce is an attempt to make a distinction not authorized by the supreme law. Interstate commerce as defined by the Constitution is "commerce among the several states," and Congress alone has power to directly regulate such commerce. The Constitution does not provide for two classes of "commerce among the several states." The right given to Congress by the Constitution with respect to commerce among the states is as complete with respect to a movement in commerce of but one mile and from one state to another as it is where the transportation extends over thousands of miles and the route traveled covers many states.

"If, as was intimated in that case (referring to the case of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196), interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes, or to which it is bound before or after crossing such state line,—in other words, if it be commerce to send goods from Cincinnati in Ohio to Lexington in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington; and while the reasons that influenced this court to hold in the *Wabash* case that Illinois could not fix rates between Peoria and New York may not impress the minds so strongly when applied to fixing the rates or toll upon a bridge or ferry, the principle is identically the same." *Covington, etc. Bridge Co. v. Kentucky*, 154 U. S. 1, c. 218.

The business of Kansas Natural does not involve merely the transportation of gas from a point outside of the State of Missouri to a point within such State. Its business is much broader and more complex. It includes the production and purchasing and transportation of gas in volume sufficient to meet the requirements of distributing companies in some thirty towns and villages in the States of Missouri and Kansas. (Trans. 40.) The gas is transported partly from Oklahoma and partly from Kansas into and through Kansas and into Missouri. The population of the cities and towns served exceeds one-half million. (Trans. 40.) According to the record, among the cities served are Atchison, Leavenworth, Topeka, Lawrence and Kansas City, all in Kansas, and at the north end of the lines. The various cities in Missouri, including

Kansas City at the north and Joplin at the south; also such cities as Coffeyville, Pittsburg, Columbus and Independence, all in Kansas at the south end of the line. (Trans. 73-81.)

Assuming the principle contended for by complainants to be correct, that is, that in the absence of Federal regulation, a State may directly regulate the rates to be charged for transportation in "interstate commerce of a local nature," one is confronted with the inquiries: What is "interstate commerce of a local nature"? Is Kansas Natural engaged in "local interstate commerce"? We do not know what may be meant by "interstate commerce of a local nature," but if the term is susceptible of definition, it surely could not include transportation over parts of three states and to thirty cities in two of such states. If this is "interstate commerce of a local nature," then under what circumstances is interstate commerce not "local"? In the light of this situation, certain parts of the opinion of trial court are important. The court said, quoting from the case of *Wabash v. Illinois*, 118 U. S. 557:

"And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect union by the framers of the Constitution, if at every stage of the transportation of goods and chattels through the country the state within whose limits a part of this transportation must be done, could impose regulations concerning the price, compensation or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

"Those remarks are thought pertinent in the case at bar. This gas originates in Oklahoma, passes through Kansas and comes into Missouri; and, of course, if the principles contended for by complainant be indulged, there might be, could be, and probably would be such regulation in these various states as in a very prohibitive degree to burden, restrict and embarrass the commerce of this Nation." (Trans. 130.)

Evidently appellants, State and Commission, as well as appellant, the Kansas City Company, (because Kansas City Company adopted the allegations of the bill filed by State and Commission) had in mind in making the averment that the business of Kansas Natural is "interstate commerce of a local nature" the decisions of this court which establish the proposition which is so clearly stated by Prentice & Eagan in their work on "The Commerce Clause" at page 28:

"* * * In matters of local nature, such as are auxiliary to commerce, rather than a part of it, the inaction of Congress is to be taken as an indication that for the time being, and until it sees fit to act, they may be regulated by state authority."

The same authors in the same work at page 89, state the same principle in somewhat different form:

"Upon interstate commerce, the states may lay no burden whatever, for that, it is said, amounts to such a regulation of it as belongs to Congress alone; while, on the other hand, it is frequently said that matters that are auxiliary to commerce, or which may be used in aid of commerce, the powers of the state, in the absence of federal action, are unimpaired."

Upon the basis of the principle that the states may lay no burden whatever on interstate commerce, the power to fix or regulate rates for interstate transportation has been denied to the states by this court. The two cases which are perhaps most frequently cited in support of the above principle are the cases of *Wabash Railroad Company v. Illinois*, 118 U. S. 557, and the *Minnesota Rate Cases*, 230 U. S. 332.

Justice Hughes in writing the opinion of this court in the *Minnesota Rate cases* stated the principles applicable to the regulation of interstate commerce in terms so clear, plain and concise, that no abstract or digest of the principles could be made in less space than that embraced in the opinion itself. It is significant that in this very important decision the learned and able Justice never referred to "interstate commerce of a local nature," or attempted any classification of interstate commerce by any other designation; nor did he assert that with respect to interstate commerce the states under any circumstances had the power of direct regulation. The case relied upon by appellants, *Pennsylvania Gas Co. v. Commission*, 252 U. S. 23, 64 L. ed. 34, refers to the *Minnesota Rate cases* for the statement of the principle upon which the power of the state to make regulations affecting interstate commerce is recognized by this court. The statement in the *Minnesota Rate Cases*, (omitting citations, except where quotation therefrom is made) is as follows:

"(1) The general principles governing the exercise of state authority when interstate com-

merce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70. The conviction of its necessity sprang from the disastrous experiences under the Confederation, when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control, and to provide effective regulation of that intercourse as the national interest may demand. The words 'among the several states' distinguish between the commerce which concerns more states than one, and that commerce which is confined within one state and does not affect other states. 'The genius and character of the whole government,' said Chief Justice Marshall, 'seems to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.' *Id.* p. 195. This reservation to the states manifestly is only of that authority which is consistent with and not opposed to, the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by

which it is carried on: and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional powers to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. * * *

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. * * *

"The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be

under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.

"Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it * * *; or upon persons or property in transit in interstate commerce * * *.

"They have no power to prohibit interstate trade in legitimate articles of commerce * * *; or to discriminate against the products of other states * * *; or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on * * *; or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection.

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local

exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

"The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the necessities of navigation. * * * It was sixty years

before provision for Federal license of pilots was made, * * * and even then port pilots were not included * * *. And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the states. * * *

"A state is entitled to protect its coasts, to improve its harbors, bays, and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. * * * Thus, in *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. Ed. 96, the complainants were the owners of a valuable wharf and dock property in the Schuylkill river, and sought to prevent the construction of a bridge which had been authorized by the Legislature of Pennsylvania to connect East and West Philadelphia. It appeared that the bridge would prevent the passage of vessels having masts which had formerly navigated the river up to the complainants' wharf, and would largely reduce the income from the property. The court affirmed the dismissal of the bill upon the ground that in the absence of legislation by Congress, the State was acting within its authority. 'The States have always exercised this power,' said the court (*id.* p. 729), 'and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the Nation.' Again, in

Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185, the question related to the power of the city of Chicago, acting under the authority of the state, to regulate the closing of draws in the bridges over the Chicago river. The court said: 'The Chicago river and its branches must * * * be deemed navigable waters of the United States, over which Congress, under its commercial power, may exercise control to the extent necessary to protect, preserve and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. * * * When its (the State's) power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction * * * But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary.' Id. p. 683.

"While the state may not impose a duty of tonnage (* * *) it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control, where Congress has not acted, although the payment is required of those engaged in interstate or foreign commerce. * * * In *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. Ed. 584, 2 Sup. Ct. Rep. 732, the court had before it an ordinance of that city prescribing rates of wharfage on vessels discharging or receiving freight at public landings belonging to the city. A transportation company

having steamers plying between Pittsburgh and Cincinnati complained that the wharfage charge was exorbitant. The court held that the reasonableness of the charge, it being simply one for wharfage, was to be determined by the state law. 'The regulation of wharves belongs *prima facie*, and in the first instance, to the states, and would only be assumed by Congress when its exercise by the states is incompatible with interstate commerce.' *Id.*, p. 703. Again, in *Ouachita & M. River Packet Co. v. Aiken*, 121 U. S. 444, 30 L. Ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907, where the owners of steamboats engaged in interstate commerce on the Mississippi river complained of wharfage rates at New Orleans as unreasonable and excessive, and in effect 'a direct duty, or burden, upon commerce,' the court, overruling the contention, held that the case was 'clearly within the principle of the former decisions of this court, which affirm the right of a state, in the absence of regulation by Congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce.' *Id.* p. 447.

"Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come in conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states, and has repeatedly acquiesced in the enforcement of state laws. * * * Such laws, undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (* * *);

but the power of the state to take steps to prevent the introduction or spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control,) is beyond question. * * * In *Compagnie Francaise de Navigation 'a Vapeur v. State Bd. of Health*, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811, the court had before it the quarantine law of Louisiana, which, among other things provided the state board of health might 'in its discretion prohibit the introduction into any infected portion of the state persons acclimated, unacclimated, or said to be immune, when, in its judgment, the introduction of such persons would add to or increase the prevalence of the disease.' The supreme court of the state, interpreting the statute, held that it empowered the board to exclude healthy persons from a locality infested with a contagious or infectious disease, whether they came from without or within the state. It was objected that this provision was too broad, and that the former decisions of the court were based upon the right of the states to exclude diseased persons and things which were not legitimate subjects of commerce. The court sustained the law, saying, with respect to this argument: 'But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that some cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quaran-

tine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even though interstate and foreign commerce is affected; and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce.' *Id.* p. 931.

"State inspection laws and statutes designed to safeguard the inhabitants of a state from fraud and imposition are valid when reasonable in their requirements, and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export, or by including incidentally those brought into the state and held for sale in the original imported packages. * * *. And for the protection of its game and the preservation of a valuable food supply, the state may penalize the possession of game during the closed season, whether obtained within the state or brought from abroad. * * *

"Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the state for nonfeasance or misfeasance within its limits. * * * Until the enactment by Congress of the act of April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. Supp. 1911, p. 1322, the laws of the states

determined the liability of interstate carriers by railroad for injuries received by their employees while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some states the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and other matters specified in the statute, to establish a uniform rule. * * *

"So, where Congress has not intervened, state statutes providing damages for wrongful death may be enforced not only against land carriers, but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the state * * *. And until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to state regulation. Some states allowed an exemption by contract from all or a part of the common-law liability; others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each state exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of Sec. 20 of the act to regulate commerce. * * *. It is within the competency of a state to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the state law may obstruct the prosecution of a voyage of an interstate character. * * *. It may also create liens for damages to property on land, occasioned by negligence of vessels. * * *. Cars employed in interstate commerce may be seized by attachment under state law, in order to compel the pay-

ment of debts. * * * And the legislation of the states, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands, and is not opposed to Federal legislation.

* * * It has also been held that the state has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers, and the prohibition may have a far-reaching effect upon interstate commerce. * * *

"Again, it is manifest that when the legislation of the state is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored, and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the state, enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the state. It was an objection of this sort that was urged and overruled in *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, to the law of Iowa prohibiting the manufacture and sale of liquor within the state, save for limited purposes. * * * When, however, the state, in dealing with its internal com-

merce, undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function.

* * *

"Within the state power, then, in the words of Chief Justice Marshall, is 'that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.' *Gibbons v. Ogden*, 9 Wheat. 203, 204, 6 L. ed. 71, 72.

"And whenever, as to such matters under these established principles, Congress may be entitled to act, by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act, and by its valid interposition limits the exercise of the local authority."

In the case of *Public Utilities Commission v. Landon*, *supra*, in speaking of the business of this very company, this court said:

"That the transportation of gas through pipe lines from one state to another is interstate com-

merce may not be doubted; also it is clear that as part of such commerce, the receivers might sell and deliver gas so transported to local distributing companies, free from unreasonable interference by the State."

Beyond any doubt, any attempt to directly regulate the rates to be charged by Kansas Natural would be an "unreasonable interference by the State" with the transportation in interstate commerce carried on by Kansas Natural. Any "direct regulation" of commerce is an "unreasonable interference."

From the Minnesota Rate cases, it appears that until such time as Congress shall act, it is permissible for the states to make local regulations which may indirectly affect interstate commerce—but such regulations may never be of such a character as to directly fix the rates to be charged for transportation from one state to another. Or, if we adopt the classification of commerce that is sought to be made by the appellants. (to-wit: "local" and "national") there are certain aspects of interstate commerce national in character (which might be called "national interstate commerce") over which the State can never exercise control. These national aspects of interstate commerce include: (1) Taxation of interstate commerce; (2) taxation of persons or property in transit in interstate commerce; (3) the power to prohibit interstate trade in legitimate articles of commerce; (4) the power to discriminate against the products of other states; and (5) the power to prescribe rates to be charged for transportation from one state

into another. As to these matters, the power of Congress is supreme, and with reference thereto, there is vested in the States no permissible exercise of authority. While with respect to other phases of interstate commerce which are local in character (or as complainants describe it "interstate commerce of a local nature") among which phases there is included the power on the part of the state to make harbor and quarantine regulations, the power to enforce inspection laws, and other local regulations of a police nature, the power of states to exercise control is unimpaired, unless and until the Congress itself under the superior power vested in it enters the particular field of regulation.

Another case to which the attention of the Court is most respectfully invited, is the case of *Dahnke-Walker Milling Company v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106, in which there was presented to the Court the question of the right of the state to prevent an engagement in interstate commerce within the limits of the state, except upon conditions imposed by the State. This court in the opinion in that case, page 290, said:

"Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 688; *American Steel & Wire Company v. Speed*, 192 U. S. 500, 519; 48 L. ed. 538, 546; 24 Sup. Ct. Rep. 365. On the same principle where goods are purchased in one state for transportation to another,

the commerce includes the purchase quite as much as it does the transportation. *American Express Co. v. Iowa*, 196 U. S. 133, 143; 49 L. ed. 417, 422; 25 Sup. Ct. Rep. 182."

In the case of *Barton v. Clyne*, 258 U. S. 495, 66 L. ed. 735, this Court in construing an Act of Congress regulating and controlling among other things commission men and traders at live stock markets, held that the sale of live stock was but a part of interstate commerce, and therefore the Act of Congress which regulated the business of the commission men and traders at the stockyards was valid. The court in the opinion said:

"Stockyards and sales are necessary factors in the middle of this current of commerce."

The natural gas introduced into the State of Missouri by Kansas Natural does not come to rest in the State of Missouri as the property of Kansas Natural. It is constantly moving in interstate commerce until the moment and act of delivery to the distributing companies. The record in the case (Trans. 40) shows:

"That there are no advance orders given by the Kansas City Gas Company to Kansas Natural Gas Company for the shipment of any definite quantity of gas to Kansas City, Missouri, at any given time. but said gas is furnished and delivered continuously to meet the requirements of the Kansas City Gas Company, as governed by the requirements of its consumers from time to time."

Transportation is but a part of commerce. The sale of the goods transported is usually the object of the transportation, and in fact, the very act of com-

mercial intercourse to which the immunity from state interference was intended to be conferred by the Constitution. Goods destined for interstate commerce are not only free from state regulation during the period of transportation, but are also free from such state interference and regulation in connection with the sale itself.

These remarks are thought pertinent, because of the position of appellants as indicated on page 68 of their brief, wherein they say:

"It cannot be too strongly impressed or too often reiterated that the supply company in the last analysis is not primarily engaged in interstate commerce. It is engaged in the business of furnishing natural gas locally to local distributing companies, for local use."

We feel that appellants are confused in their statement, because the business of furnishing natural gas that has been necessarily transported from one state into another is as much a part of interstate commerce as is the act of transportation itself. The commerce conducted by Kansas Natural does not deal alone with the mere transportation of natural gas, but involves the production of the natural gas in Oklahoma or Kansas, or the purchase of natural gas in Kansas and Oklahoma, and its transportation from Kansas and Oklahoma to the State of Missouri, and its sale and delivery in the State of Missouri to the local distributing companies. The production, the purchase, the transportation, the sale, and the delivery in its several and united

results, constitutes the interstate commerce that is conducted by Kansas Natural.

The complainants and intervenor below (appellants herein) rely upon the decision of this court in the case of *Pennsylvania Gas Company v. Commission*, 252 U. S. 23, 64 L. ed. 434. In the Pennsylvania Gas case, this court upheld the power of the New York Commission to regulate the rates to be charged to consumers for natural gas by the Pennsylvania Gas Company, notwithstanding the fact that the Pennsylvania Gas Company procured its gas within the State of Pennsylvania and transported it by pipe lines from Pennsylvania to the State of New York where it sold and distributed such gas to consumers in the City of Jamestown, pursuant to a franchise granted by state authority. It appears to us that there is a clear, well-defined distinction between the case at bar and the Pennsylvania Gas case.

In the Pennsylvania Gas case the state was regulating the right to exercise the franchise which was granted by the state. The state was regulating in a direct way a local business carried on under authority of and within the state, to-wit: the distribution and sale of natural gas. In this court's opinion in the Pennsylvania Gas case, it is said:

"The thing which the state commission has undertaken to regulate, while part of the interstate transmission is local in its nature and pertains to the furnishing of natural gas to local consumers within the City of Jamestown in the State of New York. The pipes which reach the consumers served are supplied with gas directly from the mains of

the company where it brings it into the state; nevertheless, the service rendered is essentially local, and the sale of gas is by the company to the local consumers who are reached by the use of the streets of the city in which the pipes are laid and through which the gas is conducted to factory and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

"This local service is not of that character which requires general and uniform regulation of rates by Congressional action and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to local consumers is required in the public interest, and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company, but this fact does not prevent the state from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress, enabling it to exert its superior power under the Commerce Clause of the Constitution."

The Pennsylvania case is expressly decided upon the principles announced in the Minnesota Rate Cases. In the opinion in the Pennsylvania gas case, this court said:

"In dealing with interstate commerce, it is not, in some instances, regarded as an infringement upon the authority delegated to Congress to permit the states to pass laws indirectly affecting such commerce when needed to protect or regulate matters

of local interest. Such laws are operative until Congress acts under its superior authority by regulating the subject-matter for itself. In varying forms, this subject has frequently been before this court. The previous cases were fully reviewed and deductions made therefrom in the Minnesota Rate Cases."

In the Pennsylvania case the company was engaged in doing business that was readily divisible into two distinct elements: (a) the production or purchasing and transportation of natural gas from Pennsylvania to New York. (This phase of the business is clearly interstate commerce, and as such was free from direct regulation by the state); and (b) the sale and distribution of such natural gas to the public in the city of Jamestown, New York, pursuant to a franchise granted by state authority. (This phase of the business is "the thing which the state commission has undertaken to regulate, and is local in its nature," and, primarily, is subject to state regulation and control.)

The holding of this court was to this effect: (1) it was conceded in the court below that a company using the streets of a city for the distribution and sale of gas to consumers for public use was subject to regulation by the state as to the rates to be charged by such company to consumers; and (2) that this power of regulation was not lost to the state by reason of the fact that the company enjoying the franchise produces or purchases such gas (so distributed and sold pursuant to the franchise) at points outside of the state and trans-

ports the same from such points outside of the state to the place in the state in which such gas was distributed and sold; and this holding was based upon the principle that this phase of the business, to-wit: the transportation of gas from without to within the state, which is, of course, interstate commerce, is only indirectly or incidentally affected by the application of the local regulations as to rates made pursuant to the local franchise; and (3) that the state could continue to exercise the power of regulating and controlling such rates until the Congress under its superior authority should enter the field and itself exercise the power of regulation with respect to such rates.

The following points of distinction between the Pennsylvania gas case and the case at bar are readily discernible:

(1) The Pennsylvania Gas Company was operating in the City of Jamestown pursuant to a franchise. "The petitioner has lost that right (the right to itself control its price) by acceptance of a public franchise in consideration of a public service." *Re. Pennsylvania Gas Co. v. Commission*, 225 N. Y. 397, Pub. Ut. Rep. 1916-C 663, l. c. 671. The Kansas Natural is not operating in any city in Missouri pursuant to any franchise, license or privilege.

(2) The Pennsylvania Gas Company was distributing gas for public use—the Kansas Natural does not distribute gas for public use.

(3) The Pennsylvania Gas Company was furnishing gas to consumers thereof—the Kansas Natural does not furnish gas to consumers.

(4) The Pennsylvania Gas Company by virtue of the fact that it was operating in the city of Jamestown pursuant to a franchise was under a public obligation to the state to furnish gas in the City of Jamestown, this being an obligation which, of course, it must have voluntarily assumed. The Kansas Natural is under no obligation (contractual or statutory) to furnish gas to any distributing company in Missouri. It owes no public duty to the state of Missouri except only such as is due from all foreign corporations.

(5) In the Pennsylvania case, "it was conceded that the Public Service Commission had jurisdiction of the subject-matter and person of the respondent, unless its jurisdiction is an unconstitutional restriction upon inter-state commerce." *Re. Pennsylvania Gas Co. v. Commission*, 184 App. Div. 556, 171 N. Y. S. 1028, 1919-A Pub. Ut. Rep. 372, l. c. 373.—In the case at bar we confidently assert it is established that the Commission is without jurisdiction of the subject-matter, to-wit: the business of Kansas Natural in supplying gas to distributing companies, and this without respect to the business being inter-state commerce.

(6) Pennsylvania Gas Company having accepted a franchise through the authority of the State of New York under which franchise it entered upon the public streets and highways of the state for the purpose of conducting the distinctly local business of furnishing gas to consumers, was in no position to assert as against the state any lack of power on the part of the state to control the franchise which it had granted and

the Pennsylvania Gas Company had accepted.—Kansas Natural having accepted no franchise, and being under no obligation to the state of Missouri (except only such obligation as foreign corporations generally assume) is not estopped or prevented from asserting the inherent lack of power of the state to regulate the interstate commerce conducted by it.

There is absent in the case at bar every element relied upon in the Pennsylvania case to sustain the power of state regulation; there is absent in the case at bar every element of local business which could invest the Commission with the power of rate regulation.

In the Pennsylvania case the state having the power to regulate the business of a local gas distributing company, and it being established and conceded that Pennsylvania Gas Company was engaged in such business, this court held that such power was not to be taken from the state because of the fact that the company procured gas from outside of the state and transported it in interstate commerce to places within the state where it distributed such gas as a local gas distributing company. In other words, this court in the Pennsylvania case sustained the power of state regulation upon the theory that the regulation concerned matter of a local nature, to-wit: the exercise of a state franchise which was a matter only auxiliary to commerce and that such regulation only incidentally and indirectly affected interstate commerce, and was therefore within the permissible power of the state. As a matter of fact, the Pennsylvania case and the case of *Public Utilities Com-*

mission v. Landon, 249 U. S. 236, 63 L. ed. 577, Pub. Ut. Rep. 1916-C, 834, 39 Sup. Ct. Rep. 268, were decided upon the application of the same principle. In the *Landon* case, the receiver of Kansas Natural was selling gas to various distributing companies, including all of the distributing companies referred to in the case at bar under arrangements whereby the receiver was entitled as compensation for such gas to receive from the distributing companies a percentage of the amounts received from the sale. The Kansas Commission made an order regulating the rates to the consumers, which the Receiver contested upon the grounds that it was a regulation of the interstate commerce carried on by receiver. This court denied that the order directly affected or regulated the interstate commerce, but, as noted in the *Pennsylvania* case, held that "the rates to be charged to the local consumer had but an indirect effect upon such interstate commerce, and therefore the matter of rates was subject to state regulation."

Another way of distinguishing the *Pennsylvania* case from the *Kansas Natural* case, is this:

The *Pennsylvania* Company was engaged in performing two classes of business, to-wit: (a) interstate commerce in the transportation of gas from *Pennsylvania* to *New York*; and (b) the purely local business of the distribution and sale of gas in one city, one town, and one village in *New York*, which could only be done by virtue of the consent of the city, town or village, or of the state. When the *Pennsylvania Gas Company* sought and obtained the consent of the *State*

to enter upon the public streets and highways of the state for the purpose of distributing gas to consumers they thereby consented to engage in a local business, and to become subject to local regulation. They engaged in a business which generally throughout this country is subject to some form of state control with respect to rates. The local business done in the City of Jamestown, we may assume, was a substantial part of the whole transaction of transporting and delivering gas. In the case at bar, it will be noted that Kansas Natural either produces or purchases and then transports gas from Oklahoma and southern Kansas to Kansas City, Missouri, and is enabled to sell the gas at the city limits to the local company at forty cents per thousand cubic feet. The local distributing company receives such gas and then distributes it in its own mains to consumers and collects therefor at the rate of eighty-five cents per thousand cubic feet, and in addition thereto, receives fifty cents per month per customer as a "service charge." The business done by the local distributing company (i. e. the local business of distributing gas) is a matter involving greater cost to the ultimate consumer than is the business of Kansas Natural in producing or purchasing such gas from a producer and transporting such gas from Oklahoma to Kansas City.

We assume in the Jamestown case that the cost of rendering the purely local business, and the cost of what might be termed the interstate business, bore substantially the same relationship to each other as that shown in the case at bar. In view, therefore, of the

entire transaction, it was proper for the state to exercise its right to control rates to be charged by the local gas distributing agency, notwithstanding the fact that thereby, but in an incidental way, and indirectly only, such regulation affected interstate commerce. But, the only business done by Kansas Natural in Missouri is the delivery of gas transported in interstate commerce. There is no local business. The regulation of rates of Kansas Natural would directly affect and hinder interstate commerce.

In the case of *Pennsylvania v. West Virginia*, U. S., 67 L. ed. 762, (decided by this court on June 11th, 1923), it was held:

"Natural gas is a lawful article of commerce and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced, or that where it is sold, which by its necessary operation prevents, obstructs or burdens such transmission, is a regulation of interstate commerce,—a prohibited interference. *West v. Kansas Natural Gas Co.*, 221 U. S. 229; *Public Utilities Co. v. Landon*, 249 U. S. 236, 245.

"*United Fuel Gas Co. v. Hallahan*, 257 U. S. 277; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 290-291; *Lemke v. Farmers Grain Co.*, 258 U. S. 50; *Western Union Telegraph Co. v. Foster*, 247 U. S. 105; *Minnesota v. Barber*, 136 U. S. 313, *Brimmer v. Rebman*, 138 U. S. 78."

Decisions of the Supreme Court of Kansas in re: Kansas Natural Gas Company.

In the case of *State ex. rel. v. Kansas Natural*, 111 Kan. 809, the Supreme Court of Kansas held that

Kansas Natural was subject to regulation by the public utilities Commission of that state with respect to rates to be charged by Kansas Natural for the sale of gas to local distributing companies within the State of Kansas. The business of Kansas Natural in Kansas was substantially identical with the business transacted by Kansas Natural in Missouri. The decision grew out of the same controversy presented here. The Kansas court in arriving at its decision, cited its prior decisions in the case of *State ex. rel. v. Flannelly*, 96 Kan. 373, and *State ex. rel. v. Gas Company*, 100 Kan. 593.

In the two cases cited, Kansas Natural or its receivers were parties, and in both cases, the Supreme Court of Kansas also came to the conclusion that Kansas Natural was subject to regulation as to rates by the State Commission.

In the case of *State ex. rel. v. Gas Company*, 100 Kan. 593, the Supreme Court of Kansas only referred to its prior decision in the Flannelly case (96 Kan. 373) as authority for the decision in the case then at bar. So that, a consideration of the Flannelly case really disposes of the two cases cited in the late case of *State ex. rel. v. Kansas Natural*, 111, Kan. 809.

In the Flannelly case, the Supreme Court of Kansas was called upon to review an order of the Commission establishing rates to consumers for gas furnished by local distributing companies. The rates thus established were contested by Kansas Natural upon the ground that Kansas Natural by reason of its supply contracts with the local distributing companies (under the terms of

which supply contracts Kansas Natural had agreed to accept as compensation for gas furnished by Kansas Natural to local distributing companies a definite proportion of the gross amounts paid by consumers to said local distributing companies) was directly affected and concerned by any rates fixed for the distribution of gas to consumers, and that as Kansas Natural was engaged in interstate commerce, the action of the Commission in fixing rates to be charged by the distributing companies was under all of the circumstances a direct regulation of the interstate commerce conducted by Kansas Natural.

The point made by Kansas Natural that it was so interested in the rates authorized to be charged by the local distributing companies was the same point presented in this court by Kansas Natural in the case of *Public Utilities Commission v. Landon, supra*. In the District Court in the Landon case (234 Fed. 152) it was held that Kansas Natural had such a relationship to the distribution of gas to consumers that Kansas Natural might contest rates fixed by the Commission. But, it was upon this point that this court reversed the district court. This court upon this point said:

"But we cannot agree with its (the trial court's) conclusion that local companies in distributing and selling gas to their customers acted as mere agents, immediate representatives or instrumentalities of the receivers, and as such carried on without interruption interstate commerce set in motion by them."

The Supreme Court of Kansas did not rule the Flannelly case upon the principles announced by this court in the Landon case, but on the contrary, it accepted the contention made by Kansas Natural (and incidentally the Commission did not oppose such contention) that by reason of the supply contracts, it was concerned and affected by the rates fixed by the Commission. The Supreme Court, however, denied the contention of Kansas Natural that the action of the Commission in fixing rates to consumers was in conflict with the commerce clause of the Constitution. The Supreme Court's decision was based upon the following propositions:

- (1) That in accordance with the doctrine of the original package cases, Kansas Natural, having transported gas in interstate commerce into Kansas and in such state delivered such gas to various local distributing companies, such delivery constituted a break in the original package, and that upon such break, the product ceased to be in interstate commerce, and the subject-matter was then subject to regulation by the state.
- (2) That although the business of supplying gas to consumers was interstate commerce, it was not national interstate commerce; that the business admitted of no uniform system of regulation, and was therefore, not that class of interstate commerce which requires exclusive regulation by Congress, and for that reason such commerce was subject to regulation by the state with respect to the rates to be charged for such gas so transported and sold,

It is significant that in the Flannelly case the Supreme Court of Kansas made the observation that the distributing companies before selling natural gas to consumers were required under the laws of the state to obtain a franchise from the various cities in which they were operating.

In further support of its decision in the Flannelly case, the Supreme Court of Kansas cited the case of *Jamison v. Indiana Natural Gas Company*, 120 Ind. 555, 28 N. W. 76, 12 L. R. A. 562, and the case of *Manufacturers' Light & Heat Company v. Ott*, 215 Fed. 940.

In the Jamison case, the regulation under review was one concerning the pressure of natural gas being transported through pipes. The Supreme Court of Indiana upheld the regulation, notwithstanding the fact that it applied to gas transported in interstate commerce, upon the ground that the regulation was not *per se* a regulation of interstate commerce, but a regulation made in the exercise of police power, and one that, therefore, came within the principles announced by this court that states may regulate matters which indirectly and incidentally affect interstate commerce until such time as Congress enters the particular field of regulation. Clearly, the Jamison case is not an authority that establishes the proposition that a state may make regulations directly affecting interstate commerce, or that establishes the proposition that the fixing of rates to be charged for transportation in interstate commerce is within the lawful power of states.

In the case of *Manufacturers' Light & Heat Company v. Ott*, 215 Fed. 940, the decision was based upon substantially the same facts as existed in and by the application of the same principle applied in the Pennsylvania case, *supra*. The regulation made (and this regulation was upheld) applied to the rates for natural gas to consumers in West Virginia to be charged by a corporation operating in the State of West Virginia, under the authority of the State.

The late case in Kansas (*State ex rel. v. Kansas Natural*, 111 Kan. 809) is in our opinion erroneously decided. It seeks to apply the principles of the earlier Kansas case to a situation that is entirely different from that assumed to exist in the earlier cases. In the earlier Kansas case, it was assumed (in fact it was contended by Kansas Natural) that there was such a relationship between Kansas Natural and the local distributing companies arising out of and by virtue of the supply contracts, that the local distributing companies were, in fact, the mere agents or immediate representatives or instrumentalities of Kansas Natural, and as such they (the local companies) carried on without interruption the interstate commerce set in motion by Kansas Natural, or in other words, it was in effect contended that Kansas Natural was itself selling and distributing gas to local consumers pursuant to franchises held by its agents, the distributing companies. If the contention of the Kansas Natural in that respect was well-founded, then the earlier Kansas cases were in point of fact very close to, if not identical with, the Penn-

sylvania case; but this court in the Landon case; *supra*, held that Kansas Natural had no such relationship to the distributing companies or to the consumers of the distributing companies as would justify the claim made by it. After the decision of this court in the Landon case by the order of the United States District Court in the receivership proceedings, the supply contracts between Kansas Natural and the various distributing companies were held to be void, so that any basis upon which even a contention might be made that Kansas Natural was concerned with the rates to the consumers was eliminated. (Trans. 73).

As the business of Kansas Natural is conducted today, its transactions in connection with the sale of gas to local distributing companies are as disconnected with and independent of the transactions between local distributing companies and their consumers as any two distinct and independent transactions could possibly be. Kansas Natural is not concerned with the rates charged to consumers by local gas distributing companies. Of course, Kansas Natural is concerned, just as any business institution is concerned, with the solvency of its customers. If the rates authorized to be charged by the local distributing companies be fixed so low that the local distributing companies cannot pay Kansas Natural for gas, it would have a bearing upon the business of Kansas Natural; but Kansas Natural for that reason would not, of course, be authorized to contest the validity of such rates.

As the agency theory has been denied by this court in the Landon case, and any basis of an agency theory has been destroyed by the setting aside of the supply contracts, the proposition advanced by the Supreme Court of Kansas in the earlier cases that the business being transacted by Kansas Natural is within the exception recognized by this court in the original package cases, is without application, for the doctrine of the original package cases was sought to be applied upon the assumption that Kansas Natural was under obligation to furnish gas to consumers in each city to which it supplied gas, and, therefore, when Kansas Natural delivered gas into the local mains (it continuing at that time to be concerned with such gas) there was an allocation or setting aside of the product for local use, and by reason thereof such product (after being set aside) lost its previous status of property being transported in interstate commerce that the transportation had ended, and the property was subject to the laws of the state. But in the Landon case, this court held Kansas Natural was engaged in interstate commerce up to and including the delivery of gas to the local distributing companies—and beyond that point, Kansas Natural was not concerned.

There is left in the earlier Kansas cases, therefore, but one proposition, and that is: That the business conducted by Kansas Natural is interstate commerce of a local nature, over which Congress has not exercised authority, and as a result, such commerce is subject to regulation by the state, even with respect to the rates to

be charged therefor until such time as Congress enters the field. This proposition goes to the very marrow of the case at bar. It is unnecessary for us to repeat here the arguments hereinbefore made with respect to the lack of such power on the part of the state. We respectfully contend that the states are without power to do this.

In addition to citing the earlier Kansas cases, the Supreme Court of Kansas in the case of *State ex rel. v. Gas Company*, 111 Kan. 809, also cited the Landon case, and the Pennsylvania Gas case. With respect to the Pennsylvania Gas case, the Supreme Court of Kansas said:

"In the last case (the Pennsylvania case) gas was produced in Pennsylvania, was transported through pipe lines to Jamestown, N. Y., and there was sold directly to the consumer by the producing company. There was no intervening distributing company. That case involved the validity of an order made by the Public Service Commission of New York regulating the rates at which the Pennsylvania Gas Company should furnish gas to its customers in the city of Jamestown. The head-note to the opinion reads:

"The transmission and sale of natural gas, produced in one state and transported and furnished directly to consumers in a city of another state by means of pipe lines from the source of supply in part laid in the city streets, is interstate commerce; but, in the absence of any contrary regulation by Congress, is subject to local regulation of rates."

"The only difference between the present case and the Pennsylvania Gas Company case is that

here the gas is sold to distributing companies who in turn sell it to the consumer, while in the Pennsylvania Gas case, the gas was sold directly to the consumer. So far as the Kansas Natural Gas Company is concerned, the distributing companies in this state may be considered the consumers of the gas sold. If that is correct, there is no difference between the present case and the Pennsylvania Gas Company case."

We feel that the Supreme Court of Kansas was not justified in assuming that the only difference between the Kansas Natural case and the Pennsylvania case lies in the fact that in the case of Kansas Natural, gas was sold to distributing companies, who in turn sold the gas to consumers, while in the Pennsylvania Gas case, gas was sold directly to consumers. We feel that the court was in error in its assumption that the distributing companies might be considered to be the consumers of the gas sold to them by Kansas Natural, and that thereby Kansas Natural may be brought within the rule established by this court in the Pennsylvania case. The one very sufficient reason why local distributing companies may not be considered to be the consumers of the gas sold to them by Kansas Natural is that local distributing companies are not the consumers of the gas sold to them by Kansas Natural, but are mere merchants of the gas sold to them. "The sale of gas to a concern for the purpose of resale is not a sale for public use." *State ex rel. v. Spokane*, *supra*. The essence of the decision of this court in the Pennsylvania Gas case is apparently overlooked by the Supreme Court of Kansas in the decision in the Kan-

sas Natural case. In the Pennsylvania case, the company was operating in the city of Jamestown, New York, pursuant to a local franchise, and it was this business (i. e. the business of distributing and selling gas to consumers in the City of Jamestown, New York, pursuant to a local franchise) that the State was regulating, and it was because of the fact that the pipe line company was engaged in the purely local business of selling gas to its consumers in the city of Jamestown, New York, pursuant to a local franchise, that the court upheld the power and authority of the State to make regulations with respect to rates to such consumers. Kansas Natural was not and is not operating at any place within the State of Kansas pursuant to a local franchise; it is engaged in no public business; its sale and delivery of gas to local distributing companies within that State is nothing more than a private sale and delivery in interstate commerce: Kansas Natural does no business of a local nature; it operates no place in the State of Kansas pursuant to authority granted by the State.

The regulation of rates of Kansas Natural sought to be imposed cannot be upheld on the theory that the regulation thereof may be effected pursuant to police power. We recognize that some courts have defined the term "police power" in terms so broad that the regulation of rates is said to be made pursuant to the exercise of police power. But a State may not act contrary to the Constitution of the United States under the cloak of police power. The Constitution has vested Congress with direct control of interstate commerce.

No direct regulation of such commerce may be exercised by the States under the theory of police power.

"The decisions also show that a State cannot avoid the operation of this rule by simply invoking the convenient apologetics of the police power. It repeatedly has been said or implied that a direct interference with commerce among the States could not be justified in this way. 'The State can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.'"

Kansas City Southern R. Co. v. Kaw Valley Drainage Dist., 233 U. S. 75, 58 L. ed. 857.

The doctrine that a state may not under the guise of police power make direct regulations of interstate commerce was applied to the attempted exclusion of intoxicating liquors by a statute of Iowa, *Bowman v. C. & N. W. R. Co.*, 125 U. S. 465. This court, in its opinion, said:

"It is not an inspection law; it is not a quarantine or sanitary law; it is essentially a regulation of commerce among the states within any definition heretofore given of that term or which can be given; and although its motive and purpose is to perfect the policy of the State of Iowa in protecting its citizens against the evils of intemperance, it is none the less on that account a regulation of commerce. If it had extended its provisions so as to prohibit the introduction into the state from foreign countries of all importations of intoxicating liquors produced abroad, no one would doubt the nature of the provision as a regulation of foreign commerce. Its nature is not changed by its application to commerce among the states."

"Where there is a conflict between the power of Congress to regulate commerce among the states and the exercise of police power by the state, the police power must yield; for if this were not so, as was stated by Justice Catron in the License cases, 5 How. 504, 600: 'The power to regulate commerce instead of being paramount over the subject would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subject of commerce and thus to circumscribe its scope and operation is, in effect, the controlling one. The police power would not only be a formidable rival, but in its struggle must necessarily tramp over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated.'"

The principle announced by the Supreme Court of Kansas (i. e. that a state may directly regulate interstate commerce of a local nature in the absence of congressional action) has never received the approval of this court. The contrary of this rule has been repeatedly announced by this court. The rules of this court with respect to interstate commerce of a local nature (if there be any such commerce so recognized) were announced in the case of *Covington Bridge Co. v. Kentucky*, 154 U. S., l. c. 218, in which case it was held that it was interstate commerce to travel by means of a bridge between Covington in Kentucky and Cincinnati in Ohio across the Ohio River, and that because such travel was interstate, it was beyond the power of the state to regulate the toll for the use of the bridge. If transportation across a bridge over a boundary stream between two

states be not subject to state regulation as to rates, notwithstanding the local character of the service afforded by such bridge, then it appears impossible to conceive how any business that is interstate can be confined to such narrow limits as to authorize the states in exercising the power of direct regulation. The Constitution of the United States answers all such contentions. The power to regulate commerce among the states is in Congress—there is no exception recognized by the Constitution of the United States, and this court has never given its sanction (at least since its decision in the *Wabash* case, *supra*) to any attempt by the states to directly regulate such commerce.

We feel, therefore, that the decision of the Supreme Court in the case of *State ex rel. v. Kansas Natural Gas Company*, 111 Kan. 809, is in error, and that the Public Utilities Commission of that state was and is without power under the Constitution of the United States to regulate the rates to be charged by Kansas Natural for the sale of gas to local distributing companies.

Points Advanced in Brief of Appellants.

The brief filed by appellants suggests nine points that should be considered by this court in connection with the review of this cause. While we think that the points in this case from the standpoint of appellee have been sufficiently presented, a brief answer to the points raised by appellants may aid the court.

The first point urged by appellants is that public welfare demands that the Kansas Natural be regulated.

The argument of appellants is one that might be properly presented to the Congress of the United States. This court is not concerned with what the law should be, but with what the law is.

As pointed out in our brief, there is no law in Missouri providing for the regulation or control of Kansas Natural, *supra*. The Supreme Court of Washington in the case of *State ex rel. v. Railroad Company*, 89 Wash. 599, 140 Pac. 591, in passing upon an argument similar to that advanced by the appellants in this cause, said:

"Granting for the sake of argument that the right of the legislature to exercise the police power to the extent of regulating and controlling the price to be charged for power sold to private individuals or others, such right should not be declared by the courts in the absence of express legislation. The regulation and control of business of a private nature is sustained by reference to the police power, and even then it is sustained only when the courts have been able to say that the business is in character and extent of operation such that it touches the whole people and affects their general welfare. It is upon this principle that *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Am. Cas. 1912-A 487; and *German Alliance Company v. Kansas*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 111, L. R. A. 1915-C 1189, rest.

"Until the legislature brings a business within the police power by clear intent, courts will not do so. Courts have assumed to say whether an act of the legislature falls within the police power, but primarily, the assertion of police power is for the legislature. They are not disposed to hold that a thing should be done by an individual or by the whole public. They have acted only after the legis-

lature has defined the object of the power. In other words, the courts have never said primarily that the police power should be applied in any given case. Their only inquiry has been whether the legislative act has been reasonably within the legislative power, and the thing sought to be done is fairly within the terms of the act. And it is well that this is so, for the legislative body can extend the demand of police power with sufficient rapidity. There is no reason why the court should engage in a rivalry with it." (Italics ours.)

Appellants' statement of facts under the first point in their brief is not correct, and their conclusions and deductions sought to be made from the evidence are erroneously drawn. Appellants state that the rates and charges of Kansas Natural have always been "restricted or regulated." Appellants state that such rates and charges were "restricted or regulated" from 1906 to October, 1912, by the supply contracts and city ordinances referred to therein and attached thereto. This court in the case of *Public Utilities Commission v. Landon*, 249 U. S. 236, specifically held that the supply contracts and city franchises did not "restrict or regulate" the rates of the Kansas Natural, and because the United States District Court for the District of Kansas had erroneously held that Kansas Natural's rates were "restricted and regulated" by such city ordinances and contracts, the decision of the court below was reversed.

Appellants state that from October, 1912, to August, 1917, said contracts and ordinance rates were continued in effect by administrative orders of court. This statement is correct, but in view of the fact that

neither such supply contracts or city ordinances were a "restriction or regulation" of the rates of Kansas Natural in the sense that such terms apply to public utility rates, the continuation of the rates provided therein by court order were neither a "restriction nor regulation."

Appellants state that from August, 1917, to November, 1918, the rates and charges of Kansas Natural "have been restricted or regulated under the administrative order of the United States District Court, in which the supply companies' rate was fixed at a certain percentage of the distributor's selling rates, fixed by the court." The regulation of public utility rates is a legislative function, and the very fact that the court administering the property, affairs and business of Kansas Natural should by order of court fix the rates of Kansas Natural is, of course, conclusive that the rates prescribed by the court were not a "restriction or regulation" of rates in the sense in which the term "restriction or regulation" is applied in a public utility rate case.

Appellants urge that from November, 1918, to July, 1919, rates of the Kansas Natural were fixed by administrative orders of the court in the same manner as described in the next preceding paragraph. What is said in the next preceding paragraph applies with equal force here.

It is also stated that from July 14, 1919, to July 1, 1920, under the further administrative orders of the court, rates of Kansas Natural were fixed and restricted upon a flat rate basis of twenty-five cents per thousand cubic feet in southern Kansas, and thirty-five cents per

thousand cubic feet at Kansas City. What was said in the next two preceding paragraphs, apply with equal force to this paragraph.

Appellants also state that the rates of Kansas Natural were "restricted or regulated" from July 1, 1920, to April 29, 1922, by the order of the Commission, which is shown in the transcript at page 88. It appears from the order referred to (Trans. 82-88) that the Kansas City Company made application to the Commission for authority to increase its rates to consumers; that Kansas City Company's application for authority to increase its rates was based upon an order of the United States District Court increasing rates to be charged by Kansas Natural to Kansas City Company to thirty-five cents per thousand cubic feet. *The Kansas Natural was not a party to the proceeding before the Commission. The Kansas Natural did not file a schedule of rates with the Commission, nor ask authority from the Commission to increase its rates.* The order made by the Commission authorized the Kansas City Company to increase its rates to its consumers, and purported to authorize the Kansas City Company to pay to Kansas Natural the rates fixed not by the Commission, but by the United States District Court. The Act is very clear with respect to the procedure which must be pursued by a public utility in order to obtain authority to increase its rates. The utility, and not one of its customers, must file a schedule of rates with the Commission; the Commission may suspend such rates, and conduct a hearing and inquiry. The statement made by appellants that the rates of Kan-

Gas Natural were "restricted or regulated" by the order of the Commission is without foundation in law or in fact.

It is also stated in appellants' brief (page 24) that the rates and charges of Gas Natural have been "restricted or regulated" by the Public Utilities Commission of Kansas, and in proof of this statement, appellants refer to nothing contained in the record in this cause, but offer as proof a statement found in the case of *State ex rel. v. Gas Company*, 111 Kan. 810. If appellants are seeking to establish a fact, they should have introduced evidence of that fact in the record in a regular and orderly way. However, it appears from the decision of the Supreme Court of Kansas that the Gas Natural rate referred to was authorized by an order of the District Court and approved by the Public Utilities Commission of Kansas. The order of the Public Utilities Commission is not in the record. The Supreme Court of Kansas says the rate was as fixed by the order of the federal court, and approved by the Commission, so we may assume that the action of the Kansas Commission was in general along the line of that taken by the Missouri Commission. We are not concerned in this case with what was done before the Kansas Commission, and, of course, we are not concerned in this case with evidence that is not in the record.

In appellants' brief on pages 28, 29 and 30, there is listed a number of cases (many of them being repeated under the names of various co-plaintiffs or co-defendants). These cases are listed under a statement that

"the following long list of cases regulatory in their nature in which Kansas Natural has directly or indirectly been involved, and in which the states of Kansas and Missouri, other Commissions and cities have been seeking in some manner to control said supply company, evidence a pressing need for regulation." An examination of these cases discloses that a majority of them were cases which were not "regulatory in their nature" and did not involve an attempt upon the part of either state, either commission, or any city to control or regulate the rates or services of Kansas Natural.

The case of *Kansas v. Flannelly*, 96 Kan. 372, is hereinbefore referred to in this brief (p. . .).

The case of *McKinney v. Kansas Natural Gas Company*, 206 Fed. 772, which is also listed in the cases as "*Fidelity Title & Trust Co. v. Kansas Natural*," deals with an application of the receivers of Kansas Natural appointed by the State Court to require receivers appointed by the Federal Court to surrender possession of the property in their custody to the applicants. There is in the case no question of state or federal control of gas rates, gas service, or gas business.

The case of *McKinney v. Landon*, 209 Fed. 300, which is also referred to in the list of cases under the title of "*Fidelity Title & Trust Co. v. Landon*," is the decision of the Circuit Court of Appeals of the Eighth Circuit affirming the decision of the district court in the case referred to in the next preceding paragraph. There is in the case no question of state or federal control of gas rates, service or business.

The case of *Landon v. Kansas Natural Gas Company*, 217 Fed. 187, which is also referred to in the list of cases under the title of "*Landon v. McPherson District Judge*," deals only with the question concerning the receivership of the Kansas Natural in the federal court, and there is not even the remotest reference in the case to the regulation of the affairs of Kansas Natural Gas Company, its rates or service.

The case of *Fidelity Trust Company v. Kansas Natural*, 219 Fed. 614, which is also referred to in the list under the title of "*McKinney v. Kansas Natural*," held that the receivers of Kansas Natural were not required to comply with an order of the Public Utilities Commission of Kansas, because the order sought to be imposed was "an undoubted regulation of this (inter-state) commerce, direct in its nature, and thus beyond the scope of state action."

The case of *State of Kansas ex rel. v. Wyandotte County Gas Company*, 88 Kan. 165, was a controversy between the Public Utilities Commission of Kansas, and the Wyandotte County Gas Company, a local gas distributing company in Kansas City, Kansas, and Rose-dale, Kansas, and involved one question, and that was the right of the Wyandotte County Gas Company to increase its rates in accordance with the terms of the franchise granted by Kansas City. Kansas Natural was not a party to the cause. The decision in the case did not, directly or indirectly, turn upon any question concerning the power of the Commission or the state to regulate Kansas Natural.

The case of *Wyandotte County Gas Company v. State of Kansas*, 231 U. S. 622, is the decision of this court affirming the Supreme Court of Kansas in the case referred to in the next preceding paragraph.

The case of *State ex rel. v. Litchfield*, 97 Kan. 592, 155 Pac. 814, is a case in which the Supreme Court of Kansas did hold that the Kansas Natural was subject to regulation as to rates at Olathe, Kansas, because of the so-called supply contracts. The decision of the Supreme Court of Kansas held that because of the contracts, the local company was the mere agent of Kansas Natural, and, therefore, Kansas Natural was subject to regulation by the Commission. There are two answers to the holding of the Supreme Court of Kansas. In the first place, the supply contracts are no longer effective; their enforcement has been enjoined. (Trans. 77-80.) The Olathe Company, as well as the Kansas Commission, were enjoined from enforcing the contracts which were the subject of adjudication in the case of *State ex rel. v. Litchfield*, *supra*, by the decree of Judge Booth. (Trans. 73-81.)

The second and more conclusive answer to the case of *State ex rel. v. Litchfield*, *supra*, is that this court in the case of *Public Utilities Commission v. Landon*, 249 U. S. 236, in reversing the District Court, construed these identical contracts, saying: "But we cannot agree with its (the District Court's) conclusion that local companies in selling gas to their customers acted as the mere agents, immediate representatives or instrumentalities of the receivers."

The case of *State ex rel. v. Gas Company*, 100 Kan. 593, 165 Pac. 1111, is discussed at other parts of this brief. (See page ...)

The case of *St. Joseph Gas Co. v. Barker, Attorney-General*, 243 Fed. 206, involved a controversy between the distributing company at St. Joseph, Missouri, and the Public Service Commission of Missouri, over the matter of rates. Kansas Natural was not a party to the cause.

The case of *Landon v. Commission*, 234 Fed. 152, did involve, in part, a review of attempted regulations of Kansas Natural. The Commission was enjoined from enforcing its orders.

The case of *Landon v. Public Utilities Commission*, 242 Fed. 658, is a direct adjudication by the District Court that rates fixed for Kansas Natural by the provisions of the laws of Kansas were non-compensatory and unreasonably low. But this court, in an appeal from that decision, in the case of *Commission v. Landon*, 249 U. S. 236, reversed such parts of the case below as held that either the law or the commission had attempted to fix the rates of Kansas Natural.

The case of *Landon v. Public Service Commission*, 245 Fed. 950, holds that the business conducted by Kansas Natural is interstate commerce and that, therefore, it is free from regulation by the states.

The decision of this court in *Commission v. Landon*, 249 U. S. 236, is referred to and listed as though it were three separate and distinct cases. Its holding has been referred to herein.

The case of *Landon v. Court of Industrial Relations*, 269 Fed. 411, is a decision of the United States

District Court in the Kansas Natural receivership case, after the decision of this court in the case of *Commission v. Landon*, 249 U. S. 236, in which the District Court carried out the instructions of this court and heard certain issues only as between the distributing companies and the states.

The case of *Landon v. Court of Industrial Relations*, 269 Fed. 423, is a decision that to some extent turned upon the question of regulation of Kansas Natural by the Kansas Commission.

The case of *Landon v. Court of Industrial Relations*, 269 Fed. 433, involved only a review of orders affecting rates of distributing companies.

The case listed as "*State of Missouri v. Kansas Natural*, 282 Fed. 341," is the decision of Judge Van Valkenburgh in the case at bar.

The case of *State of Missouri, ex rel. v. Kansas Natural*, No. 155 October, 1923, Term, United States Supreme Court, is this case.

The case of *Kansas v. Gas Company*, 111 Kan. 809, 208 Pac. 622, is the decision of the Supreme Court of Kansas hereinbefore referred to and discussed. (See page —.)

The case listed as "*Kansas Natural Gas Company v. Kansas*, No. 133, October, 1923, Term, United States Supreme Court," is the case pending herein on appeal from the decision of the Supreme Court of Kansas in the case referred to in the next preceding paragraph.

The case listed as *Central Trust Co. v. Consumers Light, Heat & Power Company*, 282 Fed. 680, is a de-

cision of Judge Pollock presiding in the United States District Court for the District of Kansas, holding that Kansas Natural Gas Company was not subject to regulation as to its rates, for the reason that it is engaged in interstate commerce.

The case listed as "*State of Kansas v. Central Trust Co.*, No. 137, October, 1923, Term, United States Supreme Court," is an appeal from the decision referred to in the next preceding paragraph.

Commencing at page 31 of their brief, appellants discuss the proposition that Kansas Natural is a public utility at common law. There are several alleged statements of fact or conclusions drawn from the evidence contained in this subdivision of the brief that we desire to sharply challenge.

On page 35, appellants state that Kansas Natural offers to serve all consumers and distributing companies on and along its lines who apply for service, at a uniform, regular and published schedule of rates, without negotiation, agreement or private contract.

We are amazed at such a statement. Appellants are not justified from any evidence or admission in pleading to draw such a conclusion. From other parts of the brief, it appears that this conclusion is sought to be drawn from the notice sent by John M. Landon as Receiver of Kansas Natural under date of July 14, 1919. (Trans. 70.) This is a notice that informed all distributing companies supplying natural gas to the cities named in the notice that from and after a date fixed in the notice, the price of gas would be as stated in said

notice. It appears from the record that there actually was a distributing company in each of the cities listed in the notice that was receiving gas from Kansas Natural and distributing such gas in each of the cities listed. (Trans. 73-81.) The notice given is a short, compact, complete and comprehensive notice that was delivered to each and all of the distributing companies that were taking their gas from Kansas Natural. It is surprising that appellants would argue that because of this notice Kansas Natural had offered to serve "all consumers and distributing companies on and along its lines who applied for service, at a uniform, regular and published schedule of rates, without negotiation, agreement or private contract." The facts are that Kansas Natural never had and does not now make any such offer, and the statement is without the slightest support in fact. The notice only applied to distributing companies already connected with Kansas Natural and it does not apply to consumers at all.

Appellants in their brief at page 37, state that Kansas Natural has the power of eminent domain, and, remarkable to state, in this, a case which involves the construction of Missouri laws, they cite in support of their statement a Kansas statute, and do not cite or refer to any statute of Missouri which would confer the power of eminent domain upon Kansas Natural in that State. We have argued in our brief that Kansas Natural does not have the power of eminent domain under the laws of Missouri. (*Supra*, p——.)

At the top of page 38, appellants state that Kansas Natural has no contract as to rates with any of the distributing companies, for the reason that the original contracts have been annulled as to rates by decree of court at the suit of Kansas Natural, and no other written contracts have been made between Kansas Natural and the distributing companies. This is a startling statement, in view of the record in the case.

It appears from the evidence, (Trans. 38-39) that from October 12, 1912, to August 13, 1917, the receivers of Kansas Natural furnished gas to the distributing companies under the orders of court, which did not specifically adopt the said supply contracts. Clearly, the distributing companies were receiving and paying for gas during this period pursuant to a contract in writing, because the receivers were furnishing the gas pursuant to an order of court, (and there being no disaffirmance of the old supply contracts) the contracts would prevail, and in fact they did prevail. It further appears from the stipulation that from August 13, 1917, to January 1, 1921, the Receivers of the Kansas Natural furnished gas pursuant to administrative orders of the United States District Court, copies of which are attached to the stipulation as Exhibits "A" to "E," inclusive. (Trans. 62-63.) Each of such exhibits specifically sets forth an order of court or the receivers fixing the rates to be charged by the receivers of Kansas Natural to each and every of the distributing companies supplied by it. Clearly, gas furnished pursuant to such orders was sold pursuant to a written contract that

was binding upon the receivers of the Kansas Natural as well as distributing companies when they received such gas. The statement of appellants that there is no contract as to rates between Kansas Natural and the various distributing companies as made in their brief on page 38, is all the more startling when we examine appellants' brief at page 90. At the latter page, appellants state that when the receiver of Kansas Natural on July 14, 1919, issued his notice fixing the price of gas to be charged the various distributing companies, the Kansas City Company and other distributing companies, relying upon said offer to furnish gas and to sell gas at such price, did thereupon pay the price fixed in said notice, and have continuously thereafter so paid the price, and are willing, ready and able to continue to do so, and that, therefore, "*a contract arises*" (italics are appellants'), not only implied, but expressed, to continue to furnish said gas at such price until changed by agreement or failing in such agreement, until such reasonable time after notice as would enable Kansas City Company to obtain a supply of gas elsewhere.

On page 38 of Appellants' brief, they state that Kansas Natural undertook by contracts to perform the public service of furnishing and supplying natural gas required by city ordinance. They refer in support of their conclusion of fact to the supply contract between predecessors of Kansas Natural and predecessors of the Kansas City Company. Our answer to appellants' conclusion is: First: The supply contracts referred to are no longer operative. They have been

decreed to be void by the decision of Judge Booth in the receivership case. (Trans. 73-71.) Second: The decision of this court in the case of *Commission v. Landon*, 249 U. S. 236, construed these contracts as not fixing a public obligation upon Kansas Natural. The remaining matter found on page 38 of the brief is all concerned with the construction of the supply contracts, which, of course, are no longer operative, no matter what those contracts might have been originally construed to be.

On page 39 appellants in their brief state that Kansas Natural employs licensed agencies of the State, to-wit:—public utilities, to sell and market its product. In the next paragraph, it concludes by reference to the record of the Landon Case, No. 330 in the October, 1918, Term of this Court (which record, incidentally, is no part of the record in this case that Kansas Natural in 1915 filed application with the Public Utilities Commission of Kansas to fix rates for the distributing companies it served *on the unwarranted assumption that they (distributing companies) were its (Kansas Natural's) mere agents*, and had no voice in the rates charged consumers. If Kansas Natural was unwarranted in assuming that the distributing companies were its mere agents in 1915, how are appellants warranted in assuming that the distributing companies are now the agents of Kansas Natural?

Again, on page 39 of their brief, appellants state that Kansas Natural filed its own schedule of rates, rules and regulations with the Commission in 1913, as provided by the Act, and in support of this statement,

they refer to the record. (Trans. 109-111.) An examination of the record with respect to this schedule discloses that the rates referred to apply only to Jasper County, outside of the limits of incorporated cities, and along the 16-inch line through Platt and Buchanan counties, from the Missouri River to the city limits of St. Joseph; that is to say, the rates referred to in the schedule are for the consumers supplied direct in the Joplin, Missouri, mining district, and to main line consumers north of Kansas City. The rates referred to in the schedule are not in controversy in this cause, and have nothing whatever to do with the rates to be charged by Kansas Natural to any distributing company.

Commencing at page 39 and continuing through to page 41, appellants argue that the notice found in the record at page 72, which is similar, if not identical, with the notice on page 70, constitutes a general and unrestricted offer to serve all who apply for gas, and appellants refer to it as a "formal public notice and schedule." There is not the slightest reason to construe this notice to distributing companies actually taking gas from Kansas Natural Gas Company as an offer to serve all who should apply. We do not know what appellants mean by the statement that this is a "formal published notice and schedule." It is not a schedule of rates filed with any regulatory body. It was a notice sent only to the distributing companies actually receiving gas from the Kansas Natural, and bore the approval of the judge who was administering

the property. Clearly, such a notice does not charge defendant and its property with the public duty of furnishing gas to all who may demand it. Kansas Natural is under no such duty or obligation.

The third point sought to be made by appellants is that Kansas Natural is declared by statutes to be a public utility. Appellants cite a Kansas statute upon this point. Of course, as far as this case is concerned, Kansas Natural must be a public utility within the Missouri statutes. Our arguments upon this point are advanced heretofore, pages to

The fourth point sought to be made by appellants is stated to be that interstate commerce in natural gas is local in its nature; is peculiarly of local concern; makes provision for local needs; pertains to local public service, and is subject to reasonable state regulation. All of these points are argued by us in other parts of this brief.

In addition to the cases that we refer to as sustaining our theory, to-wit: that the State of Missouri may not prescribe or regulate the rates to be charged by Kansas Natural to local distributing companies, appellants in their brief refer to the case of *Commission v. Power Company*, 282 Fed. 837, and *Coal Company v. Commission*, 7 A. L. R. 1081, 100 Southeastern, 557. Considering these two cases in the reverse order, we find that in the case of *Coal Company v. Commission*, *supra*, the Supreme Court of Appeals of West Virginia held that an electric power company which was generating electric power in the State of

Virginia and then transporting such power into the State of West Virginia, where such power was sold directly to the consumer in West Virginia, was subject to regulation as to the rates charged by it by the Public Service Commission of West Virginia. The case of *Coal Company v. Commission, supra*, is, in our judgment in its essence identical with the case of *Pennsylvania Gas Company v. Commission, supra*.

In the case of *Commission v. Power Company*, 282 Fed. 837, the defendant, the Southern Power Company was operating a hydro-electric plant, from which it was furnishing electrical energy to certain power companies. The Circuit Court of Appeals held "by the laws of North Carolina, hydro-electric companies are declared to be public service corporations, subject to the laws of the State regulating public service corporations, and under the control of the Corporation Commission." The Southern Power Company had exercised the power of eminent domain, which, the court held, could only have been conferred upon companies engaged in public service. The Circuit Court of Appeals also said that the people of North Carolina had in very comprehensive terms explicitly provided for control and regulation of just this character of companies. The court also pointed out that the statute authorizing the commission to control rates and service of electric power companies did not limit that control to rates charged to the consumers only. There is nothing in the laws of North

Carolina limiting the power of the Commission to the regulation of rates for light, heat or power.

The case of *Commission v. Power Company*, *supra*, does not control the case at bar. The case of *State v. Commission*, 275 Mo. 496, *supra* comes much nearer to be identical with the present case. In the North Carolina case it was established (a) the laws of the state provided expressly for the control of the companies in the very class to which the defendant belonged, and (b) the company that was sought to be controlled had accepted the right conferred by law to exercise the power of eminent domain, thereby admitting (or at least being estopped from denying) that its business was "public." In other words, the North Carolina case was one in which "public profession" arose from "comprehensive terms explicitly provided by law," and from the conduct of the party that was being controlled. In the present case, the Act does not provide for the regulation of the business that is being done, but, on the contrary, by necessary implication, it expressly excludes the character of business being done. The North Carolina case and the case at bar are not similar, because of the dissimilarity in the statutes of Missouri and the statutes of North Carolina. The decision of the Supreme Court of Missouri in construing the Missouri Act, is the controlling factor in the case.

The fifth point sought to be made by appellants is that the specific exclusion of interstate commerce in natural gas from the Act of Congress regulating

interstate commerce implies and authorizes regulation by the state of interstate commerce in natural gas until Congress acts. That portion of our brief in which we discuss the power of the state over interstate commerce answers this contention. This provision of the Act of Congress may authorize indirect regulation or incidental regulation affecting transportation in interstate commerce, but under the principles of the Minnesota Rate Cases, it cannot authorize the states to make direct regulations of interstate commerce, because such regulations would be in violation of the Constitution of the United States. This court upon several occasions had held that the states are without power to make regulations directly affecting interstate commerce in natural gas. The latest decision of this court upon the point (and the decision was rendered long after the passage of the Act of Congress referred to) is that of *Pennsylvania v. West Virginia*, U. S., 67 L. ed. 762, *supra*.

The sixth point sought to be established by appellants' brief is that a corporation employing a licensed agency of the state, a public utility, to sell and market products shipped interstate, thereby consents to reasonable state regulation. The argument upon this point opens with the statement that Kansas Natural in the last analysis is not primarily engaged in interstate commerce at all. Appellants averred that the business of defendant is interstate commerce, (Trans. 7) and this court in the cases which have been heretofore cited, *supra*, p., has found it engaged in interstate com-

merce. Appellants state on page 68 that the general body of the public at large is not Kansas Natural's customers. This statement is true. The Kansas Natural supplies gas only to the distributing companies; but it does not supply gas to the distributing companies as agents in any sense. The sale of gas by Kansas Natural to the local distributing companies is a complete sale at the point of delivery, and the interstate movement ceases with delivery. The local distributing companies, in the sale of their gas to the local consumers were held not to be the agents of Kansas Natural by this Court in *Public Utilities Commission v. Landon*, 249 U. S. 236, and the decision in the Landon case, of course, was based upon the status of the properties when the supply contracts were effective. Clearly, if they were not under the supply contracts, they are not now. Appellants cite the famous case of *Brown v. Maryland*, 12 Wheat. 419, as being in point. That case fits the situation that is here presented, but not as contended by appellants. In the case of *Brown v. Maryland*, the Supreme Court declared a law of Maryland restricting the right of an importer to sell his goods unconstitutional. Chief Justice Marshall in outlining the principle of the so-called "original package rule," said that if an importer would break the original package of imports, the property would then become subject to state regulation, or if the importer should use a state agency as for example a licensed auctioneer for the sale of his goods, he could not object to paying the auctioneer's fees. But

in the case at bar, Kansas Natural is not employing the local distributing companies as factors, or agents, to sell its product to consumers; the sale is outright and complete, and not on consignment, and when the product passes to the consumer, the distributing company is a principal in the sale and not a mere agent.

The seventh point in appellants' brief, page 73, is with respect to the construction of the case of *Public Utilities Commission v. Landon*. That case is already fully discussed in our brief, and nothing further need be said by us on this point.

The eighth point in the brief, page 81, is stated to be that a public utility or one conducting a business affected with a public interest may not arbitrarily discontinue service for the non-payment of a controverted bill, and that an injunction will issue to prevent such wrongful act. But it is also a well-established principle of equity that when it once takes jurisdiction, it will hear the entire cause. This point assumes that Kansas Natural is a public utility, and that it was seeking to arbitrarily discontinue the supply of gas on account of the non-payment of a controverted bill. We think that we have successfully shown that Kansas Natural is not a "gas corporation" within the meaning of the Missouri public utilities act, and therefore it is not a public utility; therefore, its rates are not subject to regulation by the Commission, which was the point presented in the court below.

This case does not in its primary aspect, present a private dispute between a public utility and one of its

customers. The State of Missouri and the Commission acting pursuant to the power assumed to be vested in them by law, by the bill of complaint, sought to assert their sovereign right of compelling Kansas Natural to comply with the laws of Missouri, in this, to-wit: not charging any consumer or distributing company any rate not authorized by the Commission under the Act or from discontinuing service on account of the non-payment of any bill not authorized by the Commission. Appellants (State, Commission and Kansas City Company) in their brief state their position thus: "*This action is maintained for the purpose of requiring the supply company (Kansas Natural) to file its rates with the Commission as provided by law.*" There was presented to the court below the question, "Is Kansas Natural required to file its rates with the Commission?" and having determined the inquiry presented in the negative, the court properly dismissed the bill.

The two Missouri cases cited by appellants do not sustain appellants' contentions. The case of *Randolph v. Gas Company*, 250 S. W. 642, was a case in which a gas company cut off service where there was a dispute as to the amount of gas consumed. The user of the gas sought a mandatory injunction to compel the company to restore service. The court inquired into the merits of the dispute, to-wit: the amount of gas actually consumed, and found the issues in favor of the consumer. The case of *State ex rel Kenlock Telephone Co.*, 93 Mo. App. 1. c. 363, 67 S. W. 684, was an action in mandamus to compel the installation

of a new service where it was refused for the reason that the proposed customer had failed to pay bills due the company for prior service. The facts were all found in favor of the user and the writ issued. In the Gas Company case (250 S. W. 646) the Kansas City Court of Appeals referred to the decision of the St. Louis Court of Appeals in *McDaniel v. Waterwork Company*, 48 Mo. App. 273, in which there was presented a dispute between a waterworks company and a consumer over a bill. The waterworks company was about to shut off the water, when the consumer sought injunctive relief, but upon hearing the injunction was dissolved. The court in its opinion said:

"We do not take the view, pressed upon us by counsel for the plaintiffs, that, if the plaintiffs do not see fit to pay this excessive charge, the only remedy of the defendants is an action at law to recover the same. The slightest reflection will show that a water company could not do business if its only remedy for the waste of its water by its customers consisted in actions at law against them severally. This would lead to an almost infinity of actions to collect very small bills against scattered consumers, many of them mere renters and insolvent."

In all of the above Missouri cases, the decisions are based upon rules established by the utility regulating the discontinuance of service. Of course, no rule with respect to the discontinuance of service is pleaded in the case at bar, except only the rules established by the Act which requires that rates shall be changed only in accordance with the Act. The court below found the statutory rule did not apply to the business of Kansas

Natural, so that Kansas Natural was not violating or about to violate any rule which it was required to observe when it advised its customers that it would only furnish gas upon the payment of increased rates.

On page 84 appellants cite certain cases as sustaining their contention that Kansas Natural may not discontinue service on account of a disputed bill, but is required to continue service and sue at law to recover the amount of its bill. In the case of *Foster v. Monroe*, 82 N. Y. Sup. 83, 40 Mis. Rep. 449, in the opening words of the opinion, it is held as follows:

"Pending this action to ascertain the proper amount due, plaintiffs ask to have the defendant enjoined from cutting off the water supply to their premises."

This case certainly contemplated that "equity" and not "law" was to determine the correctness of the bill.

Another case cited is *Simms v. Water Company*, 87 So. 688, 205 Ala. 378, in which the Supreme Court of Alabama announces the rule:

"The weight of authority seems to hold that, in case of a *bona fide* dispute as to the amount demandable for water supplied, or to be supplied under reasonable regulations requiring payment in advance, the consumers' recourse, if put to it, in order to save his supply of water pending a settlement of the dispute, is to pay the amount demanded, and sue for its recovery, if unjust, in law and fact, or to invoke the equity jurisdiction of the court to the end that the water company may be enjoined pending a judicial determination of the matter in dispute, offering to pay the sum the court may ascertain to be due."

The case of *Waterworks Company v. Davis*, 77 So. 927, 16 Ala. App. 333, cited by appellants, is an action for damages on account of the wrongful discontinuance of water service, and it does not hold, as contended by appellants.

The case of *Burrough of Washington v. Water Company*, 62 Atl. 390, 70 N. J. Eq. 254, cited by appellants, recognizes that the court of equity, where relief is sought, in the case of disputed public utility bills shall determine the correct rate to be charged.

The case of *Dodd v. Atlanta*, 154 Ga. 33, 113 S. E. 166, cited by appellants, holds that a court of equity should enjoin a public utility from discontinuing service to a consumer when it appears that there is a real dispute as to the amount due from the consumer to the utility and the consumer in his bill has expressed a willingness to pay the amount which the court should determine to be due.

The cases of *Hatch v. Consumers Co.*, 17 Idaho, 204, 104 Pac. 670, and *Pool v. Water Company*, 81 So. Car. 438, 62 S. E. 874, cited by appellants, were actions in mandamus wherein the courts reviewed certain rules of public utilities that were asserted to be unreasonable. In neither case did the courts announce any such rule as that contended for by appellants.

Equity did interfere in this cause for the very purpose of determining the issue raised by the pleadings of the complainants. That is, the court determined that Kansas Natural was not required to file its rates with the Commission. This cause was not dismissed below

because of any holding by the court that appellants did not have the right to resort to equity. That which was done by the court below was consistent with the ruling in every case cited by appellants.

Commencing at page 81, and continuing to page 82, appellants refer to cases which establish the principle that a public utility which is not subject to regulation by an agency of the state or national government, may not, therefore, charge unreasonable rates. Our observation with reference to this proposition is that the point is not in the case. Appellants offered no evidence establishing or tending to establish that the rate proposed to be charged by Kansas Natural was unreasonable.

The ninth point in the case is stated to be that if Kansas Natural's rates are not subject to regulation, it is bound by contract, express or implied, to continue service until after notice a substitute can be provided; and second, such rates can be agreed upon. Under this point, and at page 90, appellants make the statement that when the supply company (meaning thereby John M. Landon as Receiver for Kansas Natural Gas Company) on July 14, 1919, issued a notice to the distributing companies supplying natural gas to all of the cities named in the notice that after the meter reading in August, 1919, the price of gas would be thirty-five cents per thousand cubic feet, that the supply company thereby entered into an agreement either by implication or expressly, that it would continue to supply gas at the rate of thirty-five cents per thousand cubic feet until that rate was changed by agreement, or if an agreement

could not be reached, then until such reasonable time after notice was given to enable the Kansas City Gas Company to make other provisions for a supply of gas to meet the demands of its customers.

There are two answers that readily suggest themselves to the above observations of the appellants. These answers are, first: The question of a contract arising out of the notice of July 14, 1919, is not asserted by the pleadings, and therefore is not in the case. Neither the bill of complaint nor the intervening bill of the Kansas City Company refer to any such purported contract. The only reference to a contract in the bill of complaint or intervening bill deals with the so-called supply contracts of November 17 and December 3, 1906. These so-called supply contracts were by decree of the United States District Court entered on the 24th day of December, 1920, held to be no longer operative or binding upon Kansas Natural, and the appellants in this cause were permanently enjoined from enforcing or seeking to enforce the same. (See this brief, page ...)

But another insuperable objection to the above contention made by the appellants is that the notice itself expressly discloses that the price therein fixed was not to continue until changed by agreement, or if an agreement for a changed price could not be made, until such reasonable time as would enable Kansas City Gas Company to arrange for a supply of gas elsewhere, because the notice, which is addressed to all distributing companies supplying natural gas to all of the cities named, is to the effect "that from and after the average meter

reading date in August, 1919, and until further notice," the rates therein specified will be charged.

Furthermore, it appears from the transcript of the record (pages 71, 72) that by the order of Judge Booth on the 13th day of October, 1919, the very schedule of rates which is referred to as forming the basis of the contract, was temporarily suspended, and that the so-called thirty-five cent rate became effective not with the meter readings of August, 1919, but on and after March 25, 1920. (Trans. 72.)

It also is apparent from the notice given by the managing receiver of the Kansas Natural Gas Company that the rates prescribed by the order of January 20, 1920 (Trans. 72), were to be effective only "until further notice."

Conclusion.

The only business done by Kansas Natural in the State of Missouri is the completion of the transportation of gas in interstate commerce by the sale and delivery of such gas to purchasers who are public utilities using such gas for re-sale to consumers thereof. Kansas Natural transacts no business of a local nature in the State of Missouri. The only business of Kansas Natural in the State of Missouri is interstate commerce. Kansas Natural is not subject to regulation by the State of Missouri through the commission with respect to the rates to be charged by it to distributing com-

panies, for the reason that the business being transacted by Kansas Natural is interstate commerce and Kansas Natural is not a "gas corporation" within the meaning of the Act.

Judge Van Valkenburgh, before whom this case was tried, delivered a very able opinion in which he came to the conclusion that the bill of complaint should be dismissed. This opinion is found in the transcript at pages 123 to 131, inclusive, and is, therefore, not reproduced herein.

Wherefore, for the reasons herein stated, appellee submits that the decision of the court below should be affirmed.

Respectfully submitted,

HERBERT O. CASTER,
ROBERT D. GARVER,
RICHARD J. HIGGINS,

*Attorneys and Counsel for Kansas
Natural Gas Company, Appellees.*

APPENDIX.

Statutes of Missouri Referred to in Pleadings and Brief.

There is involved in this cause, the following sections of the Act:

Subdivisions 10 and 11 of Section 10411, Revised Statutes of Missouri, 1919, which defines the term "gas plant" and "gas corporation," and Sections 10477, 10478 and 10479 of the Revised Statutes of Missouri, 1919, which requires "gas corporations" to obtain the consent of the Commission before changing rates. It is admitted by the pleadings that Kansas Natural has not complied with Sections 10477, 10478 and 10479.

The portions of the foregoing sections of the Act which it may be necessary to examine, are as follows:

Subdivision 10 of Section 10411 is as follows:

"The term 'gas plant' when used in this chapter, includes all real estate, fixtures and personal property owned, operated, controlled, used or to be used for or in connection with or to facilitate the manufacture, distribution, sale, or furnishing of gas (natural or manufactured) for light, heat or power."

Subdivision 11 of Section 10411, is as follows:

"The term 'gas corporation' when used in this chapter, includes every corporation, company, association, joint stock company or association,

partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating, controlling or managing any gas plant operating for public use under privilege, license or franchise now or hereafter granted by the state or any political subdivision, county or municipality thereof."

Section 10477, in so far as applicable, is as follows:

"Every gas corporation * * * shall furnish and provide such service, instrumentalities and facilities as shall be safe and adequate, and in all respects just and reasonable. All charges made or demanded by any gas corporation * * * for gas, shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, or in excess of that allowed by law or by decision of the commission is prohibited.

"2. No gas corporation * * * shall directly or indirectly by any special rate, rebate, drawback, or other device or method charge, demand, collect or receive from any person or corporation a greater or less compensation for gas, except as authorized in this chapter than it charges, demands, collects or receives from any other person or corporation for doing a like or contemporaneous service with respect thereto under the same or similar circumstances or conditions.

"3. No gas corporation * * * shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality or to any particular description of service in any respect whatsoever, or subject any particular person, corporation, or locality or any particular description of service, to any undue or unreasonable advantage or prejudice in any respect whatsoever.

"4. Nothing in this section shall be taken to prohibit a gas corporation from establishing a sliding scale for a fixed period for the automatic adjustment of charges for gas. * * * Provided that the sliding scale shall first have been filed with and approved by the commission."

Section 10478 reads as follows:

"The Commission shall: 1. Have general supervision of all gas corporations, electric corporations and water corporations having authority under any special or general law, or under any charter or franchise to lay down, erect, or maintain wires, pipes, conduits, ducts or other fixtures in, over or under the streets, highways and public places of any municipality, for the purpose of furnishing or distributing water or gas or of furnishing or transmitting electricity for light, heat or power, or maintaining underground conduits or ducts for electrical conductors, and all gas plants, electric plants and water systems owned, leased or operated by any gas corporation, electrical corporation or water corporation.

"2. Investigate and ascertain from time to time the quality of gas supplied by persons, corporations and municipalities; examine or investigate the methods employed by such persons, corporations and municipalities in manufacturing, distributing and supplying gas for light, heat or power, and in transmitting the same, and have power to order such reasonable improvements as will best promote the public interests, preserve the public health, and protect those using such gas and those employed in the manufacture and distribution thereof, and have power to order reasonable improvements of extensions of the works, pipes, lines and other reasonable devices, apparatus and property of gas corporations.

"3. Have power by order to fix from time to time standards for the measurement for the purity or illuminating power of gas to be manufactured or sold by persons, corporations or municipalities for lighting, heating or power purposes * * * and by order to require gas so manufactured, distributed or sold to equal the standard so fixed by it, and to prescribe from time to time the reasonable minimum and maximum pressure at which gas shall be delivered by said persons, corporations or municipalities for the purpose of determining whether the gas manufactured, distributed or sold by such persons, corporations, or municipalities for lighting, heating or power purposes conforms to the standards of illuminating power, purity or pressure and conforms to the orders issued by the Commission, the Commission shall have power of its own motion to examine and investigate plants and methods employed in the manufacturing, delivering and supplying gas, and shall have access through its members or persons employed and authorized by it to make such investigation and examinations to all parts of the manufacturing plants owned, used or operated for the manufacture, transmission or distribution of gas. * * * Any employe or agent of the Commission who divulges any fact or information which may come to his knowledge during the course of any such inspection or examination, except in so far as he may be directed by the commission or by a court or judge thereof, or authorized by law, shall be guilty of a misdemeanor.

"4. Have power in its discretion to prescribe uniform methods of keeping accounts, records and books to be observed by gas corporations. * * * It may also in its discretion prescribe by order forms of accounts, methods and memorandum to be kept by such persons, corporations

or municipalities. Notice of alteration by the Commission in the required method or form of keeping the system of account shall be given to such persons, corporations by the Commission at least six months before the same shall take effect. Any other and additional forms of accounts, records, memorandums kept by said corporation shall be subject to examination by the Commission.

"5. Examine all persons, corporations and municipalities under its supervision and keep informed as to the methods, practices, regulations and property employed by them in the transaction of their business. Whenever the Commission shall be of the opinion after hearing had upon its own motion or upon complaint that the rates or charges or acts, or regulations of such person, corporations or municipalities are unjust, unreasonable, unjustly discriminatory or unduly preferential or in any wise in violation of any provision of law, the Commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished, notwithstanding a higher rate has been heretofore authorized by statute and the just and reasonable acts and regulation to be observed; and whenever the Commission shall be of the opinion after a hearing had upon its own motion or upon complaint that the property, equipment or appliances of any such person, corporation or municipality are unsafe, insufficient or inadequate, the Commission shall determine and prescribe the safe, efficient and adequate property, equipment and appliances thereafter to be used, maintained and operated for the security and accommodations of the public and in compliance with the provisions of law and of their franchises and charters.

"6. Require every person and corporation under its supervision and it shall be the duty of

every person and corporation to file with the Commission an annual report verified by the oath of the president, treasurer and general manager or receiver, if any thereof * * * the report shall show in detail (a) the amount of its authorized capital stock and the amount thereof issued and outstanding; (b) the amount of its authorized bonded indebtedness and the amount of its bonds and other forms of evidence of indebtedness issued and outstanding; (c) its receipts and expenditures during the preceding year; (d) the amount paid for dividends upon its stock and interest upon its bonds; (e) the names of its officers and the aggregate amount paid as salaries to them, and the amount paid as wages to its employees; (f) the location or locations of its plant and system, with a full description of its property and franchises, stating in detail how each franchise said to be owned was acquired; and (g) such other facts pertaining to the operation and maintenance of the plant and system and affairs of the corporation or system as may be required by the Commission. * * *

(Paragraph 7 deals with reports from municipally operated plants.)

"8. Have power through its members or inspectors or other employees duly authorized by it to enter in and upon and inspect the property, building, power houses, ducts, conduits, and offices of any of such corporations, persons or municipalities.

"9. Have power to examine the accounts, books, contracts, records, documents and papers of any such corporation, person or municipality and have power, after hearing, to prescribe by order the accounts in which particular outlays and receipts shall be entered, charged or credited.

"10. Have power to compel, by *subpoena duces tecum*, the production of any accounts,

books, contracts, records, documents, memoranda and papers. In lieu of requiring production of originals by *subpoena duces tecum* the Commission or any commissioner may require sworn copies of any such books, records, contracts, documents and papers, or parts thereof, to be filed with it. The Commission may require of all such corporations, persons, or municipalities specific answers to questions upon which the Commission may need information, and may also require such corporations, persons or municipalities to file periodic reports in the form covering the period and filed at the time prescribed by the Commission. If such corporation, person or municipality shall fail to make specific answer to any question or shall fail to make a periodic report when required by the Commission as herein provided within the time and in the form prescribed by the Commission for the making and filing of any such report or answer, such corporation, person or officer of the municipality shall forfeit to the state the sum of one hundred dollars for each and every day it shall continue to be in default with respect to such report or answer. Such forfeiture shall be recovered in an action brought by the Commission in the name of the State of Missouri. The amount recovered in any such action shall be paid to the public school fund of the state.

"11. Have power in all parts of the state, either as a commission or through its members, to subpoena witnesses, take testimony and administer oaths to witnesses in any proceeding or examination instituted before it, or conducted by it in reference to any matter under this article.

"12. Have power to require every gas corporation to file with the Commission and to print and keep open to the public inspection schedules showing all rates and charges made, established or enforced or to be charged or enforced; all

forms of contract or agreement of all rules and regulations relating to rates, charges or service to use or to be used and all general privileges and facilities granted or allowed by such gas corporation. * * * But this subdivision shall not apply to state, municipal or federal contracts. Unless the Commission otherwise orders, no change shall be made in any rate or charge or in any form of contract or agreement or any rule or regulation relating to any rate, charge or service or in any general privilege or facility which shall have been filed and published by a gas corporation, except after thirty days' notice to the Commission and publication for thirty days as required by order of the Commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the change will go into effect. The Commission for good cause shown may allow changes without requiring the thirty days' notice under such conditions as it may prescribe. No corporation shall charge, demand, collect or receive a greater or less or different compensation for any service rendered or to be rendered than the rates and charges applicable to such service as specified in its schedule filed and in effect at the time; nor shall any corporation refund or remit in any manner or by any device any portion of its rates or charges so specified nor to extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are regularly and uniformly extended to all persons and corporations under like circumstances. * * *

"13. *In case any * * * gas corporation engaged in carrying on any other business than owning, operating or managing a gas plant, which other business is not otherwise subject to the jurisdiction of the Commission and is so conducted that its operations are to be substantially*

*kept separate and apart from the owning, operating, managing or controlling of such gas plant, said corporation with respect to such other business, shall not be subject to any of the provisions of this chapter and shall not be required to procure the consent or authorization of the Commission to any act in such other business or to make any report in respect thereof, but this subdivision shall not restrict or limit the powers of the Commission in respect to the owning, managing, operating and controlling by such gas corporation of such gas plant. * * * and said powers shall include also the right as to and prescribe the apportionment of capitalization, earnings, debts and expenses fairly and justly to be awarded to or borne by the ownership, operation, management or control of such gas plant as distinguished from such other business. In any such case, if the owning, operating, managing or controlling of such gas plant is wholly subsidiary to the other business carried on by it and is inconsiderable in amount and not general in its character, the Commission may by general rules exempt such corporation from full reports and from the keeping of accounts as to such subsidiary business."*

Section 10479:

"Whenever there shall be filed with the Commission by any gas corporation * * * a new rate or charge, or any new form of contract, or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege, or facility, the Commission shall have and it is hereby given authority either upon complaint or upon its own initiative without complaint, at once and if it so orders without answer or other formal pleading by the interested gas corporation * * * but upon reasonable notice to enter upon the hearing concerning the propriety

of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the Commission upon filing such schedule and delivering to the gas corporation * * * a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, form of contract or agreement, rule, regulation or practice, but not for a longer period than one hundred twenty days beyond the time when such rate, charge, form of contract or agreement, rule, regulation or practice would otherwise go into effect, and after full hearing, whether completed before or after the rate, charge, form of contract or agreement, rule, regulation or practice goes into effect, the Commission may make such order in reference to such rate, charge, form of contract, or agreement, rule, regulation or practice as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective, provided that if any such hearing cannot be concluded within the period of suspension, the Commission may in its discretion suspend the time for a further period, not exceeding six months. At any hearing involving a rate, sought to be increased after the passage of this article, the burden of proof to show that the increased rate or proposed increased rate is just shall be upon the gas corporation, and the Commission shall give to the hearing a decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

STATE OF MISSOURI ON THE RELATION OF
BARRETT, ATTORNEY GENERAL, ET AL. v.
KANSAS NATURAL GAS COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MISSOURI.

KANSAS NATURAL GAS COMPANY v. STATE OF
KANSAS ON THE RELATION OF HELM, AT-
TORNEY FOR THE PUBLIC UTILITIES COM-
MISSION OF THE STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATE OF KANSAS ON THE RELATION OF JACK-
SON, ATTORNEY FOR THE PUBLIC UTILITIES
COMMISSION OF THE STATE OF KANSAS, ETC.
v. CENTRAL TRUST COMPANY OF NEW YORK
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF KANSAS.

Nos. 155, 133 and 137. Argued April 21, 1924.—Decided May 26,
1924.

1. The business of piping natural gas from one State to another and selling it, not to consumers, but to independent distributing companies which sell it locally to the consumers, is interstate commerce free from state interference. *Pennsylvania Gas Co. v. Public Service Comm.*, 235 U. S. 23, distinguished. P. 307.
 2. An attempt of a State to fix the rates chargeable in this interstate business is a direct burden on interstate commerce, even in the absence of any regulation of it by Congress. P. 308.
- 282 Fed. 341, (No. 155) affirmed.
111 Kans. 809, (No. 133) reversed.
282 Fed. 680, (No. 137) affirmed.

In the first of these cases the appellants sought to enjoin the Kansas Natural Gas Company from increasing

its rates in Missouri without the consent of the Public Utilities Commission of that State. The decree of the District Court refusing the injunction is here affirmed.

In the second case the Kansas Supreme Court allowed a peremptory mandamus to compel the same company to reestablish and maintain certain rates in Kansas until otherwise ordered by the Utilities Commission of that State. Reversed.

The third case was a suit in the federal court in Kansas to enjoin collection by the same company of increased rates in Kansas until allowed by the Kansas Utilities Commission. The injunction was denied. Affirmed.

Mr. J. W. Dana and *Mr. Frank E. Atwood*, with whom *Mr. L. H. Breuer* was on the brief, for appellants in No. 155.

I. The public welfare requires that the Kansas Natural Gas Company be regulated.

II. The Kansas Natural Gas Company is a public utility at common law. *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389; *Terminal Taxicab Co. v. District of Columbia*, 241 U. S. 252; *San Joaquin Co. v. Stanislaus County*, 233 U. S. 454.

III. The Kansas Natural Gas Company is declared by statutes to be a public utility.

IV. Interstate commerce in natural gas is local in its nature, is peculiarly of local concern, makes provision for local needs, pertains to local public service, and is subject to reasonable state regulation.

The record shows that the Supply Company has a complete monopoly of the supply of natural gas to some forty cities, towns and villages in Eastern Kansas and Western Missouri, and serves one-half million people; that the distributing companies have no other source of supply of natural gas; that the primary undertaking and duty of the Supply Company is to furnish natural gas. It is

immaterial where that gas comes from. The duty, bottomed on the original supply-contracts maintained by the Receivers while the business was *in custodia legis* and continued by the Supply Company since, was to furnish natural gas. The furnishing is local to the Kansas City Gas Company and other distributing companies and at Kansas City and some forty other cities and communities served. It is for the inhabitants of the cities served as distinguished from the public at large. It "makes provision for local needs" by undertaking the supply of gas provided for in local natural gas franchise ordinances, granted to distributing companies; and "pertains to a local public service." It is delivered to and through the instrumentality of local licensed agencies, public service companies of the States.

This natural gas is so peculiarly local in its nature and restricted in its uses and method of handling, that it can not be reconsigned and transported on past the points of delivery to some other market but must be sold and consumed, if at all, in a comparatively restricted area.

Permanent physical connections are made and must be maintained between the plant and pipe line system of the Supply Company and the public service companies served.

Local measuring stations and meters are and must be maintained and operated at or within the town borders of the cities served, where the gas is continuously delivered and sold by the Supply Company to meet the consumers' instantaneous demands upon the distributing companies.

The Supply Company occupies the public highways of the States and exercises the power of eminent domain, and occupies the public streets at the point of delivery, with the license or acquiescence of the cities, towns and villages served.

There are no advance orders for natural gas but it is delivered "instanter" as required by the customers, singly

and in aggregate. The Supply Company offers service to all consumers, distributing companies, cities and towns on its lines who apply.

It has and makes no special contracts with any consumer or distributing company. Its original gas-supply-contracts were at its own suit annulled and set aside as to rates, but the service established under those contracts continues in full force and effect and it accepts the benefits and fruits of that business. It furnishes and sells natural gas not under private negotiation and contract, but upon promulgated and published schedules of uniform rates.

The foregoing facts of record clearly bring this case within the class of cases local in their nature and subject to state regulation as laid down in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23.

The character and classification of commerce, whether interstate or intrastate, national or local, is not determined or affected by the change of carriers. *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *South Covington Ry. Co. v. Covington*, 235 U. S. 537; *Atchison, etc. Ry. Co. v. Harold*, 241 U. S. 371.

It is equally well settled that such classification of commerce is not determined upon the basis of ownership or change of title of the commodity in transit. *Swift & Co. v. United States*, 196 U. S. 375; *Gulf, etc. Ry. Co. v. Texas*, 204 U. S. 403; *Atchison, etc. Ry. Co. v. Harold*, *supra*. See particularly *North Carolina Pub. Serv. Comm. v. Southern Power Co.*, 282 Fed. 837.

There is a line of analogous liquor cases which establish the principle that before the Supply Company can successfully claim that the business of furnishing and selling natural gas shipped interstate is free from state control, it must show that sales take place or are confirmed or consummated in the foreign State, and that it is not locally selling and locally delivering gas to meet

the immediate, instantaneous, simultaneous and indiscriminate demands of its customers or its customers' customers. *Heyman v. Hays*, 236 U. S. 178; *In re Rahrer*, 140 U. S. 545; *McDermott v. Wisconsin*, 228 U. S. 115.

The Supply Company's business is not capable of one uniform system of regulation. *State v. Flannelly*, 96 Kans. 372; *Manufacturers' Light & Heat Co. v. Ott*, 215 Fed. 940; *Jamieson v. Indiana Natural Gas Co.*, 128 Ind. 555; *Mill Creek Coal Co. v. Public Service Comm.*, 84 W. Va. 662.

The fixing of natural gas rates is the fixing of commodity rates—selling rates of a commodity locally. It must of necessity vary in each city served, depending upon the volume of business done, the character and classification of consumers and numerous other factors entering into and reflected in commodity prices. Transportation is a mere incident. *Mill Creek Coal Co. v. Public Service Comm.*, *supra*.

The maintenance of the Supply Company's supply of gas within the city, its pipe lines in and upon the city's streets and its meters within or near the city, continuously ready to serve, constitutes an implied standing offer to deliver, measure and sell locally at reasonable and authorized rates; the turning of the consumers' burner cocks and the drawing of the gas from the mains of the distributing company, and in turn the delivery of the gas by the Supply Company into the mains of the distributing company, constitutes an acceptance of that offer and an implied promise to pay a reasonable or authorized city gates' rate. These entire transactions are purely local.

V. The specific exclusion of interstate commerce in natural gas from the Interstate Commerce Act, implies regulation by the States until Congress acts.

VI. An importer who employs a licensed agency of the State, a public utility, to sell and market products

shipped interstate, thereby consents to reasonable state regulation.

The Supply Company is and ever will be under the necessity of using and employing licensed agencies of the States, public utilities having franchises, to market its imports. Such an importer is not engaged in interstate commerce of a national character, but is engaged in local trade and traffic subject to state regulation. *Brown v. Maryland*, 12 Wheat. 419, 443.

The furnishing of gas to the inhabitants of the city is a state function kindred to building roads and paving streets over which the State alone has control. *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477; *Field v. Barber Asphalt Co.*, 194 U. S. 618.

The *reductio ad absurdum* of the Supply Company's claim is, that its right to import gas carries with it the unrestricted right not only to raise and lower its rates but, at its own will and caprice, to supply or refuse to supply gas, and to change its quality, and quantity and its service as to some forty public service corporations and forty or more cities, towns and villages, and one-half million people; for, if the State has no power to regulate the rates, it has none to regulate the quality or character of service or to determine the use of gas, or to exclude such use altogether.

VII. The decision in *Public Utilities Comm. v. Landon*, 249 U. S. 236, turned on the point that the Receiver had no cause of action for the reason that his rates were at that time consent rates, or fixed by contract, and the challenged rates, then before this Court, were made for distributing companies and not for the Receiver. It is no authority for the contention that the Kansas Natural Gas Company was then or is at this time, on the record now before this Court, free from state regulation.

VIII. A public utility, or one conducting a business affected with the public interest, may not arbitrarily dis-

Argument for Defendant in Error in No. 133. 265 U.S.

continue service for the non-payment of a controverted bill. Injunction will issue to prevent such wrongful act.

IX. If the Kansas Natural Gas Company's rates are not subject to regulation, it is bound by contract, express and implied; first, to continue service until, after notice, a substitute can be provided; and second, at rates agreed upon.

Mr. Robert D. Garver, with whom *Mr. Herbert O. Caster* and *Mr. Richard J. Higgins* were on the briefs, for the Kansas Natural Gas Company, appellee in Nos. 155 and 137, and plaintiff in error in No. 133.

Mr. Fred S. Jackson for defendant in error in No. 133.

The Gas Company is a public utility under the laws of Kansas. Laws 1911, c. 238, § 3; *Cimarron v. Water, Light & Ice Co.*, 110 Kans. 812.

The sale of natural gas is local in its nature. *State v. Flannelly*, 96 Kans. 372; *State v. Gas Company*, 100 Kans. 593; *North Carolina Pub. Serv. Comm. v. Southern Power Co.*, 282 Fed. 837.

The rates charged by the gas company to the distributing companies at the gates of the cities are subject to regulation by the Public Utilities Commission. *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23; s. c. 184 App. Div. 556; 225 N. Y. 397.

This Court, in the *Pennsylvania Gas Co. Case*, has expressly held that the State may regulate the sale of natural gas in interstate commerce where it is of a local nature. The sale of natural gas by the defendant to the distributing companies in no way differs from the sale by that company to cities, industries or large consumers of gas. In either case it is interstate commerce of a local nature which has not been regulated by Congress, and the principles of law which are applied to the interstate commerce at the burners' tips in the *Pennsylvania Gas*

Co. Case are equally applicable to the sale of gas measured by the flow meters to the distributing companies in Kansas.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These cases were consolidated for argument. They present for decision the single question whether the business of the Kansas Natural Gas Company, hereinafter called the Supply Company, consisting of the transportation of natural gas from one State to another for sale, and its sale and delivery, to distributing companies, is interstate commerce free from state interference?

The facts necessary to be considered in reaching a conclusion are, shortly, as follows:

The Supply Company is a Delaware corporation, engaged in producing and buying natural gas, mostly in Oklahoma but some in Kansas, and, by means of pipe lines, transporting it into Kansas and from Kansas into the State of Missouri, and in each State selling and delivering it to distributing companies, which then sell and deliver it to local consumers in numerous communities in Kansas and Missouri. The gas originating in Kansas is mingled for transportation in the same lines with that originating in Oklahoma. The pipe lines are continuous from the wells to the place of delivery.

The three cases are alike in the fact that they arise from the action of the Supply Company in making an increase of rates from thirty-five cents to forty cents per thousand cubic feet,—in Missouri, without the consent and approval of the Public Utilities Commission of the State, and, in Kansas, notwithstanding a previous order of the federal court fixing a thirty-five-cent rate and the action of the Utilities Commission approving and fixing that rate. The power of the Utilities Commission of each State is challenged on the ground that the matter, under

the commerce clause of the Constitution, is not subject to state control.

In No. 155, appellants brought suit in the Federal District Court to enjoin the Supply Company from increasing its rates. The injunction prayed was denied. 282 Fed. 341.

In No. 133, the defendant in error filed a petition in the Kansas Supreme Court for a writ of mandamus to compel the Supply Company to reestablish and maintain the rate of thirty-five cents per thousand cubic feet for gas furnished to the distributing companies, until otherwise ordered by the Utilities Commission. The case was presented to that court on demurrer to the return and answer. The demurrer was sustained and a peremptory writ of mandamus allowed, as prayed. 111 Kans. 809.

In No. 137, the suit was to enjoin the Supply Company from collecting or attempting to collect the increased rates from various gas distributing companies until the consent thereto of the Utilities Commission of the State should be secured. The Federal District Court denied the injunction but retained the bill for another purpose, not necessary to be stated. 282 Fed. 680.

The business of the Supply Company, with an exception not important here, is wholly interstate. The sales and deliveries are in large quantities not for consumption but for resale to consumers. There is no relation of agency between the Supply Company and the distributing companies, or other relation except that of seller and buyer, *Public Utilities Comm. v. Landon*, 249 U. S. 236, 244-245; and the interest of the former in the commodity ends with its delivery to the latter, to which title and control thereupon pass absolutely. The question is, therefore, presented in its simplest form; and if the claim of state power be upheld, it is difficult to see how it could be denied in any case of interstate transportation and sale of gas. Both federal courts denied the power. The state

court conceded that the business was interstate and subject to federal control, but rested its decision the other way upon the fact that Congress had not acted in the matter and that, in the absence of such action, it was within the regulating power of the State. The question is controlled by familiar principles. Transportation of gas from one State to another is interstate commerce; and the sale and delivery of it to the local distributing companies is a part of such commerce. In *Public Utilities Comm. v. Landon*, *supra*, at p. 245, this Court said: "That the transportation of gas through pipe lines from one State to another is interstate commerce may not be doubted. Also, it is clear that as part of such commerce the receivers might sell and deliver gas so transported to local distributing companies free from unreasonable interference by the State." See *Pennsylvania v. West Virginia*, 262 U. S. 553, 596, and cases there cited.

The line of division between cases where, in the absence of congressional action, the State is authorized to act, and those where state action is precluded by mere force of the commerce clause of the Constitution, is not always clearly marked. In the absence of congressional legislation, a State may constitutionally impose taxes, enact inspection laws, quarantine laws and, generally, laws of internal police, although they may have an incidental effect upon interstate commerce. *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 488-491. But the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce. In *Minnesota Rate Cases*, 230 U. S. 352, 396, Mr. Justice Hughes, speaking for the Court, said: "If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly re-

strained that which in the absence of Federal regulation should be free." The question is so fully discussed in that case, that nothing beyond its citation is required.

The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. See *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 493. With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. *Public Utilities Comm. v. Landon*, *supra*, p. 245. In such case the effect on interstate commerce, if there be any, is indirect and incidental. But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character,—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the State and before it had become part of the general mass of property therein. See *Brown v. Houston*, 114 U. S. 622, 634. There is nothing in *Pennsylvania Gas Co. v. Public Service Comm.*, 252 U. S. 23, inconsistent with this view. There the Gas Company, a Pennsylvania corporation, transmitted gas from Pennsylvania into New York and sold it directly to the consumers. The service to the consumers, which was the theory for which the regulated charge was made, was essentially local and the decision rests upon this feature. Mr. Justice Day, in the

course of the opinion, said (p. 31): "The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city." The commodity, after reaching the point of distribution in New York was subdivided and sold at retail. The *Landon Case*, so far as this phase is concerned, differs only in the fact that the process of division and sale to consumers was carried on, not by the supply company, but by independent distributing companies.

In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case*. The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. The transportation, sale and delivery constitute an unbroken chain, fundamentally interstate from beginning to end, and of such continuity as to amount to an established course of business. The paramount interest is not local but national, admitting of and requiring

uniformity of regulation. Such uniformity, even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned. See, for example: *Welton v. Missouri*, 91 U. S. 275, 282; *Hall v. DeCuir*, 95 U. S. 485, 490.

That some or all of the distributing companies are operating under state or municipal franchises cannot affect the question. It is enough to say that the Supply Company is not so operating and is not made a party to these franchises by merely doing business with the franchise holders.

No. 155 Affirmed.

No. 133 Reversed.

No. 137 Affirmed.